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Tagore Law Lectures—1875-6

**THE
LAW OF MORTGAGE IN INDIA**

BY
RASHBEHARY GHOSE, M.A., D.L.
SOMETIME TAGORE LAW PROFESSOR, CALCUTTA

FOURTH EDITION

VOLUME II

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THE TRANSFER OF PROPERTY ACT

BEING

ACT IV OF 1882.

(As amended by all subsequent Acts up to date.)

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL

(Received the assent of the Governor-General on the 17th February, 1882.)

*An Act to amend the law relating to the Transfer of
Property by Act of Parties.*

WHEREAS it is expedient to define and amend cer- Preamble.
tain parts of the law relating to the transfer of property
by act of parties ; it is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

1. This Act may be called the “ Transfer of Pro- Short title.
perty Act, 1882.”

It shall come into force on the first day of July, Commence-
1882. ment.

It extends in the first instance to the whole of Extent.
British India¹ except the territories respectively adminis-

¹ Act IV of 1882 has ceased to be
in force in the Naga Hills district, the
Dibrugarh Frontier Tract, the North
Cachar Hills, the Garo Hills, the Kha-

shia and Jaintia Hills, and the Mikir
Hills Tract—see *Assam Rules Ma-*
nual, Ed. 1893, pp. 408, 409, Pt. II,
pp. 212 and 705, respectively.

tered by the Governor of Bombay in Council, the Lieutenant-Governor of the Punjab and the Chief Commissioner of British Burma.¹

But any of the said Local Governments may, from time to time, by notification in the local official Gazette, extend² this Act [or any part thereof]³ to the whole or any specified part of the territories under its administration.

And any Local Government may, with the previous sanction of the Governor-General in Council from time to time, by notification in the local official Gazette, exempt,⁴ either retrospectively or prospectively, any part of the territories administered by such Local Government from all or any of the following provisions, namely :—

Sections 54, paragraphs 2 and 3, 59, 107 and 123.⁵

Notwithstanding anything in the foregoing part of this section, sections 54, paragraphs 2 and 3, 59, 107

¹ This reference to British Burma should now be read as referring to Lower Burma—see Act XX of 1886, s. 4, and now the Burma Laws Act (XIII of 1898). The Chief Commissioner of British Burma is now Lieutenant-Governor of Burma—see *Proclamation*, dated 9th April 1897, in *Gazette of India*, 1897, Pt. I, p. 251.

² Act IV of 1882 has been extended from 1st January 1893, to—

(i) the whole of the territories, other than the Scheduled Districts, under the administration of the Government of Bombay—see *Bombay Government Gazette*, 1892, Pt. I, p. 1071; and

(ii) the area included within the limits of Rangoon town as from time to time defined for the purposes of the Lower Burma

Courts Act, 1900, and within the municipalities of Moulmein, Bassein and Akyab jurisdiction of the Recorder of Rangoon, now Chief Court of Lower Burma—see *Burma Gazette*, 1904, Pt. I, pp. 628 and 684.

The Act has been repealed as to Crown Grants by Act XV of 1895.

³ Added by s. 2 of Act VI of 1904. Ss. 54, 59, 107, 117, 118 and 123 have been extended to the whole of Lower Burma except the areas excluded from time to time from the operation of the Indian Registration Act—see *Burma Gazette*, 1904, Pt. I, p. 684.

⁴ No such exemption has yet been made.

⁵ This clause was substituted for the original clause by Act III of 1885, s. 1.

and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1877,¹ under the power conferred by the first section of that Act or otherwise.²

2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

- (a) the provisions of any enactment not hereby expressly repealed : X- Saving of certain enactments, incidents, rights, liabilities, etc.
- (b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force :
- (c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability : or
- (d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction :

and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law.

Saving of enactments not expressly repealed.—The first clause leaves untouched the provisions of Acts XXXII of 1839 and XXVIII of 1855 as well as those of Acts XXVII of 1866 (except section

¹ Under s. 8 of the General Clauses Act, 1897, references to the Registration Act, 1877, are to be construed as references to the Registration Act, 1908.

² This clause was added by Act III of 1885, s. 2, and is to be deemed

to have been added from the date on which Act IV of 1882 came into force.

Section 54, paragraphs 2 and 3, and ss. 59, 107 and 123 extend to every cantonment in British India—see Act XV of 1910, s. 29 (1).

31 which is expressly repealed) and XXVIII of 1866; the last two Acts being confined to cases to which English law is applicable.

Incidents of contracts consistent with the Act not interfered with.

Saving of terms or incidents, &c., consistent with the Act.—The Act does not interfere with the terms or incidents of any contract which are not inconsistent with its provisions. With reference to this clause, the Select Committee observe in their report: "We have also saved all incidents of contracts not inconsistent with the provisions of the Bill. Besides the Malabar mortgagee's option, which the Bill as introduced expressly preserved, there must be many other incidents of native contracts with which it is desirable not to interfere." See para. 3 of the report dated 2nd February 1878. In the case of mortgages this has been expressly done by the insertion of section 98. Compare section 1 of the Contract Act and see *Moothora v. The India, &c., Co.* (1883), 10 Cal., 166, dissenting from *Kaverji v. The Great, &c., Co.* (1878), 3 Bom., 109; see also *The Irrawaddy, &c., Co. v. Bugwandas* (1891), 18 I. A., 121; 18 Cal., 620. As to the application of the rule of *Danduput*, see *Jeewanbai v. Manordus* (1910), 35 Bom., 199; But see *Madhva v. Venkata* (1903), 26 Mad., 662. and see notes to O. 34, r. 2, Code of Civil Procedure. *post*.

Operation of Act not retrospective except as regards procedure.

Saving of existing rights and liabilities.—Cl. (c) only accentuates the well-known maxim *Nova constitutio futuris formam imponere debet non præteritis*. *Ranchoddas v. Ranchoddas* (1877), 1 Bom., 581; *In re Ratansi* (1877), 2 Bom., 148; *Chunilal v. Fulchand* (1893), 18 Bom., 160; *Nagar v. Jivabhai* (1894), 19 Bom., 80; *Doshi v. Malek* (1895), 20 Bom., 565; *disting. Chudasama v. Naran* (1897), 22 Bom., 884; see also *Kalu v. Hanmapa* (1879), 5 Bom., 435; *Padapa v. Swamirao* (1900), 27 I. A., 86; 24 Bom., 556. But the provisions of the Act will apply to *legal relations* created *subsequently* to July 1882 though arising out of *prior* transactions. Thus, the assignment of a mortgage made after the Act came into force will be governed by the provisions of this Act, although the mortgage may have been made before. *Jugdeo v. Brij Behari* (1886), 12 Cal., 505; *Subbamal v. Venkataram* (1887), 10 Mad., 289; *Rathnasami v. Subramanya* (1887), 11 Mad., 56; *Gurulinga v. Ramalakshamma* (1894), 18 Mad., 56. The words 'nothing contained in the Act shall be deemed to affect any right which has already accrued' mean that such right shall not be prejudicially affected, and should be read with section 6 of the General Clauses Act, 1868. Cf. section 6, Act X of 1897. But the enactment in O. 34, r. 14 of the Civil Procedure Code, 1908, merely effected a change of procedure and is applicable to pending execution proceedings. *Bai Ganga v. Rajaram* (1911), 13 Bom. L. R., 245.

Act applies to subsequent legal relations.

Extinct rights not revived.

The subsequent creation of suits for foreclosure cannot, except by clear enactment, revive extinct rights and, in effect, the clear enact-

ment is the other way. *Srinath v. Kheller* (1889), 16 I. A., 85; 16 Cal., 701.

3. In this Act, unless there is something repugnant in the subject or context,—

Interpretation-clause.

“immovable property” does not include standing timber, growing crops or grass :

“instrument” means a non-testamentary instrument :

“registered” means registered in British India under the law for the time being in force regulating the registration of documents :

“attached to the earth” means—

(a) rooted in the earth, as in the case of trees and shrubs ;

(b) imbedded in the earth, as in the case of walls or buildings ; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached :

“Actionable claim” means a claim to any debt, other than a debt secured by mortgage of immovable property, or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent ;¹

and a person is said to have “notice” of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it,

¹ This paragraph was inserted by Act II of 1900.

or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, sec. 229.

What is immovable property.

Immovable property.—The Act does not profess to define immovable property but merely excludes certain things from the category. But it should be read in connection with the definition of immovable property contained in the General Clauses Act, 1897, according to which the term will *prima facie* include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. Sec. 3 (25) and sec. 4 (1), Act X of 1897. The word 'immovable' has not the narrow technical sense of 'real' in the English law; the distinction between real and personal property being a mere survival of feudalism and peculiar to the English law. It also includes many things which the law of England would class as incorporeal hereditaments. *Fattehsangji v. Dessai* (1873), 1 I. A., 34; 10 Bom. H. C., 281; 21 W. R., 178; 13 B. L. R., 254.

Ferry.

Fishery.

Thus a right of ferry is immovable property. *Krishna v. Akilanda* (1889), 13 Mad., 54. So too is a right of fishery. *Baban v. Naqu* (1876), 2 Bom., 19; *Bhundal v. Pandal* (1887), 12 Bom., 221; *Parbutty v. Mudho* (1876), 3 Cal., 276; *Ramgopal v. Nurumuddin* (1892), 20 Cal., 446; *Shibu v. Gupi* (1897), 24 Cal., 449; 2 C. W. N., 169; disting. *Fadu v. Gour* (1892), 19 Cal., 544, decided under the Specific Relief Act. A *hât* is within the definition of immovable property. *Surendra v. Bhailall* (1891), 22 Cal., 752; *Golan v. Parbati* (1909), 36 Cal., 665; 13 C. W. N., 596. But *sayer* compensation is not immovable property; *Surendra v. Kader* (1891), 19 Cal., 8; though *Malikana* is. *Harmuji v. Hirdaynarayan* (1880), 5 Cal., 921; *Churaman v. Balli* (1887), 9 All., 591; cf. Art. 132 of the Limitation Act. The right to collect market-dues on a given piece of land on which a weekly fair is held is immovable property. *Sikandar v. Bahadur* (1905), 27 All., 462; 2 A. L. J., 28; as also right to the assessment on land. *Venkaji v. Shidramapa* (1894), 19 Bom., 663; *Madhavrao v. Kashibai* (1909), 34 Bom., 287. Tiled huts are immovable property. *Amrita v. Nibaran* (1904), 31 Cal., 340.

Hât.

Sayer.

Malikhana.

Right to market dues.

It should be noticed that the definition of immovable property in the General Clauses Act is not exhaustive as is shown by the use of the word 'includes' and is in truth no definition at all. The word 'includes' would naturally mean 'comprehends' in addition to the usual meaning of the word, though the draftsman sometimes uses it as exhaustive, as for instance where he enumerates all or nearly all such things as would naturally be included in the term. When, therefore, the nature and quality of a right can only be determined by refer-

ence to any particular system of law, that law may properly be invoked for the purpose of ascertaining whether such interest is in the nature of immovable property. *Fattehsangji v. Dessai* (1873), 1 I. A., 34; 10 Bom. H. C., 281; 21 W. R., 178; 13 B. L. R., 254. Thus, a right of Brith Jajmanki or right to officiate as priest at funeral ceremonies of Hindus within a particular locality is in the nature of immovable property. *Ragho v. Kassy* (1883), 10 Cal., 73; 13 C. L. R., 263; cf. *Krishnabhat v. Kapabhat* (1869), 6 Bom. H. C., A. C., 137; *Balvantrav v. Purshotam* (1872), 9 Bom. H. C., 99; *The Collector of Thana v. Krishnanata* (1880), 5 Bom., 322; *Appana v. Najia* (1880), 6 Bom., 512; but a turn of worship in a temple is not immovable property. *Jati v. Mukunda* (1911), 16 C. W. N., 129. Tipnis Pansare right, or right to levy tolls on imports and exports, being according to Hindu Law *nibandha*, is immovable property. *Krishnaji v. Gajanan* (1909), 33 Bom., 373; 11 Bom. L. R., 352. But an allowance payable periodically which is not incidental to an hereditary office is not in the nature of immovable property, unless it is a charge upon such property. *The Government of Bombay v. Girdharlalji* (1872), 9 Bom. H. C., 222; *The Government of Bombay v. Kullianrai* (1872), 14 M. I. A., 551; cf. *Earl of Stafford v. Buckley* (1748), 2 Ves. Sen., 170; disting. *Fattehsangji v. Dessai*, *supra*. Again, though a mortgage of immovable property or a charge on it would fall within the definition of immovable property (see the cases cited at p. 70, *ante*), a claim to maintenance though a valid one, which does not constitute a charge upon any particular immovable property, is not in the nature of immovable property. *Beer Chunder v. Nobodeep* (1883), 9 Cal., 535. But where a company possessed of certain leaseholds issued debentures charging its undertaking and all its property, a contract for sale of such debentures was held to be a contract for an interest in land. *Driver v. Broud* (1893), 1 Q. B., 539; *affd. on app. at p. 744*. See also the notes to sec. 39, *post*.

There are various other statutory definitions of immovable property. See sec. 3, para. 5, Act X of 1865; cf. sec. 2(6), Act XVI of 1908. But they are properly applicable only in the interpretation of the particular Acts in which they occur, and cannot assist us in construing other Acts. An Act of the legislature, as Lord Bowen once said, may declare that a horse shall mean a cow, or a salmon an oyster, regardless of all laws of natural history; but this would not make a cow a horse, or turn an oyster into a salmon. See also the remarks of Lord Selborne in *Meux v. Jacobs* (1875), L. R., 7 H. L., 481, 493.

Attached to the earth.—It has been suggested that the definition would exclude what in England are called trade-fixtures annexed

Fixtures.

not for the better enjoyment of the land but for purposes of trade or manufacture. But the words 'imbedded in the earth' are wide enough to include machinery fixed to the land by being let into the soil, whether such machinery is erected for the purpose of trade or the better enjoyment of the land itself. *Elwes v. Maw* (1805), 3 East., 53; *Wake v. Hall* (1883), 8 App. Cas., 195, 210. And even things which are more or less capable of being used in a detached state will follow the corpus. *Ex parte Astbury* (1869), L. R., 4 Ch., 630. But though trade-fixtures are not absolutely excluded, clause (c) would exclude things affixed for the purpose of mere ornament and furniture, the reason being that such annexations are generally designed for temporary purposes only. Thus valuable tapestries affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them are not fixtures. *Leigh v. Taylor* (1902), A. C., 157; *disting. In re Whaley* (1908), 1 Ch., 615. But if a fixture though in some sense ornamental is in the nature of a permanent improvement, it will be regarded as a substantial addition to the premises from which it may not be removed. *Buckland v. Butterfield* (1820), 2 Brod. & Bing., 54.

In a recent English case the mortgagor of a house, subsequently to the mortgage, removed the ordinary fixed grates from various rooms and substituted for them "dog grates" which were of considerable weight, but were not physically attached to the structure of the house. It was held that under the circumstances the true inference was that the mortgagor placed the "dog grates" with the object of improving the inheritance and therefore they were fixtures which passed to the mortgagee. *Monti v. Barnes* (1901), 1 K. B., 205. Cf. *Reynold v. Ashby* (1904), A. C., 466. Again "Statues, ornamental vases, and stone garden-seats retaining their positions merely by their own weight, but forming part of the architectural design of the mansion and grounds, have been held to be fixtures: so, straightening-plates, that is broad iron plates embedded in the floor, and used for straightening iron, when taken out of the furnace." Dart, p. 559.

It should be noticed that the Act makes no exception, certainly not in terms, in favour of buildings which are mere accessories, such as a building merely erected to cover an engine not fixed into the soil. The words 'rooted,' 'imbedded,' 'attached' would, however exclude things retaining their position merely by their own weight, though they may be intended for the permanent beneficial enjoyment of the premises on which they have been placed. Such articles stand on a very different footing from the movable parts of fixed machinery which are necessary for the working of it. Thus a shed resting by its own weight

Meaning of the words rooted, etc.

on the foundation prepared for it is not "attached to the earth." *English law how far applicable in India.* *Chaturbhuj v. Bennett* (1904), 29 Bom., 323; 6 Bom. L. R., 1073, where it is observed that the maxim *quicquid plantatur solo solo cedit* on which the law of England as to fixtures was founded has never received so wide an application in India. For the law in England and other countries, see Burge, vol. 2, p. 6, *et seq.* Story's Conflict of Laws, § 382.

It is said in Dart that not every annexation to the freehold is a fixture; and this is certainly the case with fixtures coming under cl. (c). But the proposition that an article need not necessarily be fastened to the freehold to be a fixture is not true under the Transfer of Property Act which does not recognise what has been called 'constructive annexation,' a term possessing a dangerous amount of elasticity. Dart, p. 559.

In England the question whether an article is a fixture or not generally arises in three classes of cases. *first* as between landlord and tenant, *secondly*, as between tenants for life or in tail, or their personal representatives and the remainderman and reversioner, and *thirdly*, as between the heir and executors of a tenant-in-fee, and the whole doctrine of fixtures rests on a series of judicial decisions with occasional interference by the legislature, grafting exception upon exception on the venerable rule that whatever is affixed to the freehold becomes a part of it. In this country, however, where tenants have, generally speaking, a right to remove all fixtures which have been affixed by them, and where there is no difference between movable and immovable property as regards the law of succession, settled estates also being almost unknown, the question what constitutes a fixture seldom comes up for discussion, though it may sometimes arise on a transfer either by way of sale, or mortgage. The English law relating to fixtures which has not yet been able to disentangle itself from archaisms, it should be noticed was never adopted in India. It is a mere relic of feudalism and is not certainly based on justice, equity and good conscience. See *Mofiz v. Rasik* (1910), 14 C. W. N., 952. See also the notes to sec. 8; see also pp. 283-285, *ante*.

It is hardly necessary to add that a house being imbedded in the *Buildings*, earth is undoubtedly immovable property, for though you can move a house, you cannot do so without destroying it. It is true the materials remain; but it is no longer a house. *Natta v. Nand* (1872), 8 B. L. R., 508; see also *Denonath v. Adhor* (1900), 4 C. W. N., 470. A mortgage of a building will thus *primâ facie* carry with it the land on which it stands. *Narayana v. Ramasawamy* (1875), 8 Mad. H. C., 100. And this will be the case even when the building is erected on leased land under an agreement that the lessee might remove it or the lessor should

Buildings.

pay for it at its appraised value. Jones, sec. 146. But the transfer of a building with a view to its removal can hardly be treated as a transaction affecting immovable property; though it has been held in England that a contract for the sale of "the building materials" of a house—with a condition that all materials were to be taken down and cleared off the ground within 2 months, "after which date any materials then not cleared will be deemed a trespass and become forfeited, and the purchaser's right of access to the ground shall absolutely cease"—is a contract for the sale of an interest in or concerning land. *Lavery v. Pursell* (1888), 39 Ch. D., p. 508. But the judgment is much coloured by the language employed in cases decided under the Statute of Frauds.

Growing timber.

It seems that the exclusion of growing timber, crops or grass will not extend to a transfer which is made not with a view to their severance and removal from the soil but with a view that the transferee shall enjoy some distinct benefit out of the land. *A fortiori*, where a right is conveyed not merely to timber or crops then growing, but also to all trees and crops which may grow on the land within a named period, the grantee acquires an interest in the land. *Seeni Chettiar v. Santhanathan* (1896), 20 Mad., 58; cf. *Sukry v. Goondalul* (1870), 6 Mad. H. C., 71; *In the matter of a reference under sec. 39 of Act V of 1882* (1888), 12 Mad., 203; *Sakharam v. Vishram* (1894), 19 Bom., 207, where only a single tree was sold; disting. *Misri v. Mozahar* (1886), 13 Cal., 262; *Kalka v. Chandan* (1887), 10 All., 20; *Mammikkutti v. Puzhakkal* (1906), 29 Mad., 353. But a contract for the cutting of trees to be converted into charcoal upon the ground is a contract relating to movable property. *Alisaheb v. Mohidin* (1911), 13 Bom. L. R., 874. In England such a large number of cases has clustered round the question, that the late Lord Coleridge once said that he despaired of laying down any rule which should stand the test of every conceivable case, *Marshall v. Green* (1875), 1 C. P. D., 35. Mr. Dart, in giving the general result of the authorities, says the English law on the subject can hardly be considered as settled. *Vendors and Purchasers*, 226. The tendency, however, at the present day is to treat a transfer of growing trees and crops as a transfer only of movable property, and they will not be taken out of that category, simply because they must derive a certain amount of nutriment from the soil before they can be brought to a state of maturity. *Jones v. Flint* (1839), 10 A. & E., 753; *Sainsbury v. Mathews* (1838), 4 M. & W., 343.

What are timber?

It is necessary to state that all trees are not, strictly speaking, timber, but only such as are useful for the purpose of building. In England certain kinds of trees, if they happen to be of a particular age,

are timber throughout the country, while others may be so by local custom. (Craig on Trees and Woods, pp. 11, *et seq.*) There is, however, no such classification in this country, and in this section timber is evidently used as synonymous with trees, and includes all vegetable growths whether plants or shrubs not being grass or growing crops. Mango trees may be classed as timber in accordance with the English law if by the custom of the locality the wood is used for building purposes; *Krishnarao v. Babaji* (1899), 24 Bom., 31; *Nahanchand v. Modi* (1906), 31 Bom., 183, 197.

Actionable claim.—The present definition, which was substituted by Act II of 1900 for the definition contained in section 130 of Act IV of 1882, would appear to be somewhat in accordance with the use of the phrase ‘chose in action’ by lawyers in England in modern times. For the meaning of the words ‘debt or other legal chose in action’ in section 25 (6) in the Judicature Act, 1873, see *Colonial Bank v. Whinney* (1886), 11 App. Cas., 426, 439; *King v. Victoria Insurance Company* (1896), A. C., 251, 254; *Torkington v. Magee* (1902), 2 K. B., 427, 430; *Walker v. The Bradford Old Bank* (1884), 12 Q. B. D., 511. See also 1 Spence, 180, 181; 2 Spence, 852, and an article on what is a chose in action in 9 L. Q. R., p. 311, by Sir H. W. Elphinstone. A chattel interest is not a chose in action. *Wiltshire v. Rabbits* (1844), 14 Sim., 76; cf. *Union Bank of London v. Kent* (1888), 39 Ch. D., 238. Negotiable instruments are choses in action, but they are excluded from the operation of chapter VIII of this Act by sec. 137. See *Muthar v. Kadir* (1905), 28 Mad., 544.

A right to claim the benefit of a contract for the purchase of goods is an actionable claim within the meaning of this section. *Jaffer v. Budge-Budge Jute Mills* (1906), 34 Cal., 289; 11 C. W. N., 566; affirming 33 Cal., 702. Where the following endorsements were separately made on the back of two contracts:—(a) “As to the whole of my right (and) interest in this contract, I have sold the same to. . . .”—(b) “I have sold the whole of my right and interest in this contract and (in) the goods mentioned therein to. . . .” it was held that what was transferred was property, and that none of the exceptions to sec. 6 applied, and that the subject of transfer was an actionable claim. *Hansraj v. Nathoo* (1907), 9 Bom. L. R., 838. A claim for damages for breach of contract, after breach, is not an actionable claim within the meaning of this section, but a “mere right to sue” within the meaning of sec. 6(e) of this Act, and therefore cannot be transferred. *Abu Mahomed v. Chunder* (1909), 36 Cal., 345; 13 C. W. N., 384. A judgment debt has been held not to be an actionable claim. *Alzal v. Ramkumar* (1886), 12 Cal., 610; *Dagdu v. Vanji* (1900), 24 Bom.,

502; 2 Bom. L. R., 414; but see *Goodman v. Brown* (1886), 18 Q. B. D., 332.

Actionable claim.

“Actionable claim” was defined by the repealed section 130 as “a claim which the Civil Courts recognise as affording grounds for relief whether a suit for its enforcement is or is not actually pending or likely to become necessary.” Under that section the right to recover a loan secured by a mortgage of immovable property was an actionable claim. *Muchiram v. Ishan* (1894), 21 Cal., 568; *Jugdeo v. Brij Behari* (1886), 12 Cal., 505; *Modun Mohun v. Futtarunnissa* (1886), 13 Cal., 297; *Subbammal v. Venkatarama* (1887), 10 Mad., 289; *Rathnasami v. Subramanya* (1887), 11 Mad., 56; *Hakim-un-nissa v. Deonarain* (1888), 13 All., 102. But see *Motiram v. Jet Mal* (1894), 16 All., 313; *Ram v. Ajudhia* (1894), 16 All., 315, is distinguishable. But in the opinion of the Allahabad and Madras High Courts, a debt was not an actionable claim, till it fell due. *Siblal v. Azmatullah* (1896), 18 All., 265; *Arunachallam v. Subramanian* (1906), 30 Mad., 235. It would thus seem that ‘actionable claim’ had in some respects a narrower and in other respects a wider meaning than ‘chase in action’ in the English law.

Actual notice.

Notice of a fact when a person actually knows that fact.—See pp. 436-7, *ante*. In order to affect a person with actual notice, it is not necessary that there should be notice of the name of the person who has an interest but only that there is a person having such an interest. *Mildred v. Maspons* (1883), 8 App. Cas., 874, 885. And mere inaccuracy in a notice will not relieve a purchaser from making enquiries. Thus, in one case where the nature of the debt or rather of the security was inaccurately described, but the intended mortgagees had distinct notice of the debt, and of the trust for its discharge, it was held to be gross negligence on the part of the mortgagees to be satisfied with merely ascertaining that there was no judgment exactly answering the description of that contained in the deed. *Montefiore v. Browne* (1858), 7 H. L., 241. This case has been adversely criticised by Lord St. Leonards (*Vendors and Purchasers*, 777—779,) and would seem to fall on the border line between actual and constructive notice. Similarly, where a purchaser of a legal estate had express notice that a person was in possession under a deed which purported to convey an equitable title to the latter, it was held that erroneous recitals in the deed as to the derivation of the equitable title did not vitiate the notice. *Trinidad, &c., v. Coryat* (1896), A. C., 587. And generally speaking, if a man buys in the face of hostile claims, though the notice may be inaccurate in some respects, he runs the risk of those claims eventually turning out to be well founded. Whether he

at the time honestly thinks he has reason to disregard them or not, he cannot afterwards set himself up as an innocent purchaser without notice, but must stand or fall according to the strength of his own right as against that of the opposing claimant. *Nazeer Ali v. Ojoodhya* (1867), 8 W. R., 399, 408. Where a person is shown to have notice of a fact contained in a written statement filed in a case, he is fixed with it, although the written statement was thrown out. *Matheris v. Gulab* (1904), 6 Bom. L. R., 284. Direct and distinct notice is not always necessary. But mere casual conversations are not sufficient, unless the information is conveyed in such a way as would operate upon the mind of an ordinary man of business. *Lloyd v. Banks* (1868), L. R., 3 Ch., 488.

Notice in its strict sense must be distinguished from knowledge, though the distinction is sometimes very fine. *Mildred v. Maspons* (1883), 8 App. Cas., 874. Where knowledge is imputed, it has been held in America that it is immaterial whether the knowledge is obtained from parties in interest or from third persons, provided it is definite enough to enable the purchaser to ascertain whether it is authentic or not. Bigelow on Fraud, vol. I, pp. 388, 389. A distinction too has been taken between mere rumour which is certainly not notice, as for example, floating reports about an incumbrance upon land about to be bought, and general reputation and belief. But it has been held in England that to admit evidence of general reputation, as for instance of the insanity of a person, to fix another with knowledge of a fact, while that evidence would not be admissible to prove the fact itself, would be a violation of the first principle which regulates the reception of evidence and the administration of justice. *Greenslade v. Dare* (1855), 20 Beav., 284. It is not quite clear whether previous knowledge would be held to imply actual knowledge by the transferee at the date of the transfer, though in the case of agents, the notice is limited to information obtained in the course of the transaction. The question, it is presumed, will depend very much upon the facts of each case; though in *Hamilton v. Royse* (1803), 2 Sch. & Lef., 327, the point seems to have been treated as one of law.

Notice of a fact when but for wilful abstention, &c., or gross negligence, a person would have known the fact.—Pp. 437—447 *ante*. This is known as constructive notice which does not import any breach of a legal duty, for a purchaser or mortgagee of property is under no legal obligation to investigate the title. At the same time a person who wilfully departs from the usual course of business is not allowed to derive any advantage from his ignorance of defects which would have come to his knowledge, if he had transacted his busi-

Notice distinguished from knowledge.

Rumour distinguished from general reputation.

Constructive notice.

ness in the ordinary way. *Rajaram v. Krishnasami* (1892), 16 Mad., 301. See also *Manji v. Hoorbai* (1910), 35 Bom. 342; where it was held that the doctrine of constructive notice applies, (1) where the party charged had actual notice that the property was charged or in some way affected, in which case he is affected with notice of the facts and instruments to the knowledge of which he would have been led by an enquiry after the charge and, (2) where the party charged had designedly abstained from enquiry for the very purpose of avoiding notice. And this rule applies equally to a yearly tenant, as to the purchaser of a greater interest. *Wilson v. Hart* (1866), L. R., 1 Ch., 463. If a person, however, can make it appear reasonably certain that enquiry would have led to nothing, he will, it seems, be excused from enquiring altogether; but it will not be enough for him to say that enquiry would have only led to wrong information. *Patman v. Harland* (1881), 17 Ch. D., 353; distinguishing *Carter v. Williams* (1870), L. R., 9 Eq., 678. The word 'ought,' it may be added, does not import a duty or obligation, but simply means 'ought' as a matter of prudence, having regard to what is usually done by men of business under similar circumstances. Light is thrown on the meaning of the word by sec. 69, which relieves purchasers from mortgagees purporting to sell under powers of sale from the necessity of enquiring into the propriety or regularity of the exercise of the power. This, however, may be said to be a double-edged argument. Cf. *Bailey v. Barnes* (1894), 1 Ch., 25, 35; and see the provisions of the English Conveyancing Act, 1882, the negative form of which shows that a restriction rather than an extension of the doctrine of notice was intended by the legislature. Section 3, sub-sec. 1, runs thus:—
 "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless (i) it is within his own knowledge or would have come to his knowledge if such enquiries and inspections had been made as ought reasonably to have been made by him."

Meaning of
the word
'ought.'

Rules based
on the doc-
trine.

Mr. Maitland in his lectures on Equity (p. 126), says that the doctrine of constructive notice has given rise to a number of sub-rules of a more or less positive kind, which are generally expressed in the form 'Notice of X is notice of Y.' One of these rules is, notice of a woman's marriage would not be notice of a settlement by her of her leasehold property. *Lloyd's Banking Co. v. Jones* (1885), 29 Ch. D., 221. Again, occupation by a tenant is constructive notice of all the tenant's equitable rights, but is not constructive notice of the rights of some other person to whom the tenant pays rent. But if he had in fact learnt that the rent was being paid to some one whose receipt was inconsistent with the title of his vendor then that would be notice to him of that person's rights. *Hunt v. Luck* (1902), 1 Ch., 428. By a curious convention, Mr. Maitland adds, it is clearly settled that the fact

that people are lending money jointly is not notice that they are trustees, although in fact it is pretty certain that they will prove to be so.

The historical basis of the whole elaborate structure of constructive notice is the prevention of fraud. Fraud or *mala fides* is the true Nature of the rules. ground on which the court is governed in the cases of notice, and 'wilful shutting of the eyes' is treated as equivalent to fraud. The rules of constructive notice are not rules of property law, for if it were so, the smallness of the value of the property affected would not be taken into consideration in determining the amount of care required of the purchaser. See *Kettlewell v. Watson* (1882), 21 Ch. D., 685.

On a sale of a lease containing unusual and onerous covenants, it is Instances of constructive notice. the duty of the vendor, before the contract is made, to disclose the existence of the covenants to a purchaser ignorant of them. If he does not give the purchaser express notice of the covenants, he must, in order to affect the purchaser with notice of them shew that he gave him such an opportunity of acquainting himself with the terms of the lease under such circumstances that he ought reasonably to have done so. *Molyneux v. Hawtrey* (1903), 2 K. B., 487. The managing director of a limited company forgetting that their first mortgage debentures, though only constituting a floating security, precluded the creation of any prior charge, deposited their title-deeds with their Bank to secure the present and future overdraft of their current account. The Bank though aware that debentures had been issued, some of which they held as security for another customer's account made no enquiry in the matter. It was held that the mere possession of the debentures as security for another customer's account did not affect the Bank with notice of their contents in their dealing with the company, and the Bank, though aware that debentures had been issued, were not put on enquiry, as the managing director by depositing the title-deeds impliedly represented that a valid first charge could be given. *Ward v. Valletort, &c., Co.* (1903), 2 Ch., 654. But where the trustees upon distribution of their trust fund paid the share of a beneficiary to their solicitor in reliance upon his statement that he was the assignee of the share without calling upon him to prove his title, they were held liable for payment of what was due on a charge created prior to the assignment and which was recited in the deed but of which no notice was given to the trustees, on the ground that the assignment of the share necessarily set them upon enquiry as to the title of the alleged assignee, and that if they had done their duty and properly investigated his title they would have been affected with notice of the charge. *Davis v. Hutchings* (1907), 1 Ch., 356.

Constructive notice.

A person died after having-executed a will by which he left certain immovable property to his four elder sons subject to a charge in favour of his widow and younger sons, and made the four elder sons executors and residuary legatees of his will. After their father's death the elder sons deposited with the Bank of Bombay by way of equitable mortgage certain title-deeds relating to the property charged by the will, and subsequently executed a mortgage of the same property in favour of the Bank without stating the charge upon it. In one of the documents of title deposited with the Bank, the title of the mortgagors was indicated, and had the Bank investigated the title, which they did not do, they would have been put upon enquiry and would have become aware of the charge created by the will. In a suit brought by the younger sons against the Bank and the mortgagors to establish the priority of their charge over the mortgage to the Bank, it was held by the Privy Council, affirming the judgment of the High Court that under the circumstances the Bank had constructive notice of the charge created by the will. *Bank of Bombay v. Suleman* (1908), 35 I. A., 139; 33 Bom., 1.

It should be noticed that the doctrine of constructive notice has nothing to do with the rights and liabilities of vendors and purchasers between themselves, while the matter still rests in contract, but refers only to equities enforceable against the purchaser when the estate has passed to him. *Caballero v. Henty* (1874), L. R., 9 Ch., 447; dissenting from *James v. Litchfield* (1869), L. R., 9 Eq., 51; cf. *Reeve v. Berridge* (1888), 20 Q. B. D., 523.; but see *Phillips v. Miller* (1874), L. R., 9 C. P., 196.

Examples of constructive notice.

The circumstances giving rise to constructive notice may be of endless variety, but the cases in the reports, roughly speaking, fall under the following heads:—

(1) **Notice from not investigating title or enquiring for title-deeds.**—See pp. 437—440, *ante*.

(2) **Notice from registration.**—See pp. 443—446, *ante*; see also *Shringarpure v. Pathe* (1878), 2 Bom., 662; *Atul Kristo v. Mutty Lal* (1898), 3 C. W. N., 30; *Debendra v. Ram* (1903), 30 Cal., 599, 607; *Ram Narain v. Bandi* (1904), 31 Cal., 737, 742; *Nand Kishore v. Anwar* (1907), 30 All., 82.

(3) **Notice where deed is executed in an unusual manner.**—*Kennedy v. Green* (1834), 3 Myl. & K., 699; cf. *Greensdale v. Dore* (1855), 20 Beav., 284.

(4) **Notice from knowledge of particular fact or instrument, of connected facts and instrument by recital, reference, &c.**—See pp. 440—447, *ante*. Whether attestation of the execution

of a deed would be notice of its contents, see p. 418, *ante*; *c.f. Parsotam v. Dat* (1903), 25 All., 296, 303.

(5) **Notice from physical condition of the property.**—Where there is a visible state of things which clearly points to the existence of some burden on the property, notice of the extent and nature of such burden will be imputed to a purchaser. Thus, where a person in possession of *wak*/land sold it to a third person, it was held that the circumstance of there being a shrine and several tombs on the land at the time of the sale was sufficient to put the defendant on inquiry as to the purposes for which the land was held, and as to the title of his vendor. *Motisha v. Hiresha* (1877), Bom. P. J., 3. But a purchaser would not be bound by notice of every agreement relating to any structure which he sees on the adjoining ground which may or may not imply a servitude. *Allen v. Seckham* (1878), 11 Ch. D., 790; *disting. Hervey v. Smith* (1856), 22 Beav., 299; of which it may be noticed that Lord St. Leonards says that it carries constructive notice beyond its proper limits, for it requires a purchaser of a house to look upwards as well as about him, before he completes his purchase. *Sugden's Vendors and Purchasers*, 765. Constructive notice.

(6) **Notice from occupation or receipt of rent.**—See pp. 440—442, *ante*. Possession in order to be effectual as notice must be open, notorious and exclusive; hence if there are no visible signs to put a purchaser on enquiry, it will not be treated as constructive notice. *Disting. Holmes v. Powell* (1856), 8 DeG. M. & G., 572. It would seem that occupation of property which has not come to the knowledge of the party charged is not constructive notice of any interest in the property. *Manji v. Hoorbai* (1910), 35 Bom., 342. And it has been held in America, that where real estate is ostensibly as much in the possession of the husband as of the wife, there is no such actual possession by the wife as will import notice of an equitable interest possessed by her. *Bigelow on Fraud*, vol. I, p. 392. But when two persons who are tenants-in-common of property carry on business upon it, notice of the rights of the partnership *qua* partnership will be attributed to every one who deals with it; for partners cannot carry on the partnership business on property of which they are tenants-in-common without some kind of bargain about the use of it, and a purchaser ought to enquire into the nature of such bargain. *Cavander v. Bulteel* (1873), L. R., 9 Ch., 79. A lessee from the zemindar of a holding was fixed with notice of the occupancy-rights of the cultivators as he had knowledge that the land was a cultivatory holding but failed to enquire who the cultivators were and on what tenure they held. *Bisheshar v. Muirhead* (1892), 14 All., 362. It has been held in America that the doctrine of notice by Knowledge of occupation if necessary.

possession does not apply in favour of a vendor remaining in possession after an absolute conveyance, so as to require a purchaser from his grantee to enquire whether he has reserved any interest in the land conveyed, because so far as the purchaser is concerned, the vendor's deed is conclusive. Bigelow on Fraud, vol. I, pp. 392, 393; cf. *White v. Wakefield* (1835), 7 Sim., 401; distinguishing *Rajivapa v. Madar Saheb* (1888), Bom. P. J., 139. But as Sir Frederick Pollock suggests, having regard to the wide diffusion of *benami* holding of property in this country, notice of the apparent owner being only a benamidar may, perhaps, be more easily inferred than notice of a trust in English-speaking countries where the common law prevails. Tagore Lectures, 1894, p. 88. Cf. *Jeebunissa v. Umul* (1872), 18 W. R., 151.

Application
of doctrine in
America.

It may be here noticed that the doctrine of constructive notice is not favoured in the American courts, for reasons which will apply equally in this country, namely, that the Registration Acts are designed to protect purchasers against latent rights. Thus, constructive notice arising from tenancy is not extended in America beyond the tenant's title, so as to apply to the title of the lessor under whom the tenant holds. Kent, vol. IV, 211; see also Bigelow on Fraud, vol. I, pp. 391, 392, where it is said to be doubtful whether possession by a tenant is in every case notice even of the extent of the tenant's interest. For the most recent English case, see *Hunt v. Luck* (1902), 1 Ch., 428.

Application to
commercial
transactions.

It may be also noticed that it has been recently laid down by the court of appeal in England that the doctrine of constructive notice does not apply to commercial transactions. *Manchester Trust v. Furness* (1895), 2 Q. B., 539; but see the remarks on this case in *White and Tudor's Leading Cases*, vol. II, p. 229. However this may be, it is clear that in the absence of any statutory provision, a person cannot be charged with notice of an advertisement in a newspaper, though he may be a subscriber to the paper. To affect a person with notice, the advertisement must have been read by, or known to him. Bigelow on Fraud, vol. I, 388; cf. *Lloyd v. Banks* (1868), L. R., 3 Ch., 488.

Notice to agent
is not merely
constructive
notice.

Notice of a fact when information of the fact is given to, &c.—See pp. 448—449, *ante*. In *Rampal v. Balbhaddar* (1902), 26 I. A., 203; 25 All., 1; the Privy Council in holding that a party had notice through his *Mukhtear* of a claim, observed that the enactments in sec. 229 of the Indian Contract Act, and sec. 3 of the Transfer of Property Act are only declaratory of a general principle of law which is in an especial sense applicable to legal proceedings. It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or in other words, the agency extends to receiving

notice on behalf of his principal of whatever is material to be stated in the course of the proceedings. Again in *Mohori v. Dharmodas* (1903), 30 I. A., 114 ; 30 Cal., 539, the knowledge of the minority of the plaintiff, of the attorney and agent of the defendant was imputed to the defendant. Their Lordships observed, "the defendant was absent from Calcutta and personally did not take any part in the transaction. It was entirely in charge of Kedar Nath, whose full authority to act as he did is not disputed. He stood in the place of the defendant for the purposes of this mortgage, and his acts and knowledge were the acts and knowledge of his principal."

The matter for which the agent was employed must, however, be taken into consideration.

At an auction-sale under a power of sale in a mortgage on conditions, one of which was a depreciatory condition wholly unwarranted by the state of the mortgagor's title, the mortgaged property was knocked down to the appellant who the same day signed a written contract to purchase. In a suit by the purchaser against the mortgagor for possession of the property, to which suit the mortgagees were made parties, it was held by the Privy Council, that the purchaser was not affected with constructive notice of the true state of the title by reason of the fact that some days after the contract of sale was completed, he instructed the mortgagee's solicitor to act for him in the preparation of the deed of conveyance, and that the solicitor knew that the condition of sale was unjustifiable. The knowledge of the solicitor as to the title was not acquired in the matter for which he was the purchaser's agent and could not be used to upset a transaction of a date before that agency commenced. *Chabildas v. Dayal* (1907), 34 I. A., 179 ; 31 Bom., 566.

It is frequently said that the knowledge of the agent is the knowledge of the principal, but this formula can only be applied when the employment of the agent is such that in respect of the particular matter in question, he really does represent the principal. *Blackburn, Low & Co. v. Vigors* (1887), 12 App. Cas., 531. For some trenchant criticism on this phrase which is said to be tersely descriptive rather than strictly accurate, see the judgment of Lord Esher in the Court of Appeal in the above case (1886), 17 Q. B. D., 553. And a principal will not certainly be bound by knowledge which any agent of his, however unsuccessful in accomplishing the object in view may happen to acquire. Disting. *Blackburn v. Haslam* (1888), 21 Q. B. D., 144. On the other hand, if a person adopts the act of another, he makes the latter his agent *ab initio*, and will be affected with notice to the latter. *Jennings v. Moore* (1708), 2 Vern., 609

Notice to agent.

Agent must be employed in the same matter.

Lawyer when
treated as
agent.

There is a notion that because a person has been in the habit of employing a particular lawyer, the latter may be treated as his agent for every purpose. But it does not follow that because a lawyer has been in the habit of acting for a person or been employed to do something for him, that lawyer is his agent to bind him by anything he says, or by receiving notices or information. *Saffron, &c., Society v. Raynor* (1880), 14 Ch. D., 406, 409; see also *Tate v. Hyslop* (1885), 15 Q. B. D., 368, 374. But where a mortgagor had placed himself entirely in the hands of his solicitor and constituted him his general agent, it was held by the Court of Appeal that the knowledge of the solicitor must be imputed to the mortgagor, who should be treated as having had notice of a transfer of the mortgage which was originally made in favour of the solicitor, and that payment of the mortgage-debt to the solicitor was not effectual as against the transferee, though no notice of such transfer had been given to the mortgagor: *Dixon v. Winch* (1900), 1 Ch., 736.

Person employed in
ministerial
act.

Though the employment of a person to do a merely ministerial act would not constitute such person an agent within the meaning of the rule, *Kennedy v. Green* (1834), 3 My. & K., 699, if a person is employed to search the register for incumbrances, the principal cannot escape the effect of any knowledge acquired by such person in the course of making the search. Disting. *Foxon v. Gascoigne* (1874), L. R., 9 Ch., 658, note. As to sub-agents, see Indian Contract Act, secs. 192, 194.

It has been held in England that when the same person is employed by two companies, his personal knowledge is not necessarily the knowledge of both the companies, and knowledge acquired by him as officer of one company will not be imputed to the other company, unless he is under an obligation to communicate his knowledge to the company sought to be affected by the notice and is also under an obligation imposed on him by the latter to receive the notice; and if the common officer has been guilty of fraud or even irregularity, the court will not draw the inference that he has fulfilled his duties. *In re Hamshire Land Company* (1896), 2 Ch., 743. For the American law on the subject, see Story's Equity Jurisprudence, sec. 408a.

Whether
principal
affected by
constructive
notice of
agent.

It would seem having regard to the definition of notice in this Act that a principal will not be affected by mere constructive notice imputable to an agent. Cf. sec. 3 (ii) of the English Conveyancing Act, 1882. See also *Greender v. Mackintosh* (1879), 4 Cal., 897; where Pentifex, J., said that "for a purchaser to be affected with constructive notice through his solicitor, the latter himself must have actual notice." It is also not quite clear whether the principal can be affected by knowledge of something not

material to the transaction and which it is not the agent's duty to communicate to his employer. For the law in England see *Wyllie v. Pollen* (1863), 3 DeG. J. & S., 596.

No distinction between different kinds of notice.—Generally speaking, there is no difference between one kind of notice and another in their legal consequences; although where the conscience of a person must be affected in order to postpone his right, as in the case of a person claiming, under a registered instrument, constructive notice will not be sufficient. But notice to an agent would be treated as actual notice. *Rolland v. Hart* (1871), L. R., 6 Ch., 678; *Agra Bank v. Barry* (1874), L. R., 7 H. L., 135, 145; *Hine v. Dodd* (1741), 2 Atk., 275; *Wyatt v. Barwell* (1815), 19 Ves., 435.

Notice to joint tenants, trustees and tenants for life.—Notice of incumbrance to one joint tenant binds all. In the case of a mortgage of real estate to joint tenants to secure a debt to them jointly, notice of an incumbrance given to any one of them will bind all. *Freeman v. Laing* (1899), 2 Ch., 355. And notice which affects a trustee binds his infant *cestui que trust*. *Toulmin v. Steer* (1817), 3 Mer., 210, 222; *Wise v. Wise* (1816), 2 J. & Lat., 403; *Lloyds Bank Company v. Jones* (1885), 29 Ch. D., 221. But notice which affects a tenant for life does not bind the remainderman. *In re Macnamara's Estate* (1874), 13 L. R., Ir. 158.

Denial of notice how pleaded.—See p. 436, *ante*; see also *Davies v. Thomas* (1836), 2 Y. & C., 234; *Roots v. Williamson* (1888), 38 Ch. D., 485; cf. 4 Kent, 212; but see *Pregonath v. Surja Coomar* (1891), 19 Cal. 26, 35.

Burden of proof of notice.—There seems to be some difference of opinion on the question of the incidence of the burden of proof when a plea of purchase for value without notice is set up. It is stated in Kerr on Fraud, p. 431, that the defence of purchase for value without notice must be specifically alleged and proved by those who rely on it. But the authorities cited do not bear out this broad proposition. In the note to *Jones v. Thomas* (1733), 3 P. Wms., 243, the law is thus stated:—‘In all cases of a plea of a purchase.....notice must be denied though not charged by the bill, and it may be sufficient to deny it either by the plea or answer, since all the defendant has to do is to prove his plea, for the defendant is not to prove a negative, namely, that he had no notice.’ See also Fisher on Mortgage, sec. 1105. And this view was adopted by the Bombay High Court in *Lalubhai v. Bai Amrit* (1877), 2 Bom., 299, 303. See also *Greender v. Mackintosh* (1879), 4 Cal., 897, 910. Cf. *Atul v. Mutty* (1895), 3 C. W. N., 30; but see *Jeebunissa v. Umul* (1872), 18 W. R., 151; *Girdhar v. Hakamchand* (1871), 8 Bom. H. C., A. C., 75, 78. The plea of purchase for value without notice has been said to be peculiarly the creature of the Court of

Burden of
proof of notice.

Chancery. *Nazeer Ali v. Ojoodhya* (1867), 8 W. R., 399. But the principle which underlies it does not wholly rest upon the distinction between legal and equitable estates. In *Ramcoomar v. McQueen* (1872), L. R., I. A., Sup. Vol., 40; 11 B. L. R., 46; 18 W. R., 166; their Lordships of the Privy Council say:—‘It is a principle of natural equity which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon enquiry, that if prosecuted would have led to a discovery of it.’ Cf. *Rajivapa v. Madar Saheb* (1888), Bom. P. J., 139. But a purchaser pleading absence of notice is held strictly to proof of the payment, that being an affirmative matter; though when he has thus far established his good faith, the burden of proving notice of the prior transaction devolves on his opponent. Thus in *Varden Seth v. Luckpathy* (1862), 9 M. I. A., 307, 326, their Lordships of the Judicial Committee observed:—‘Let it be conceded that a purchaser for value, *bonâ fide* and without notice of this charge, whether legal or equitable, would have had in these courts an equity superior to that of the plaintiff, still such innocent purchase must be, not merely asserted, but proved in the cause, and this case furnishes no such proof.’ See also *Rutto v. Bajrong* (1883), 13 C. L. R., 280; disting. *Radhanath v. Gisbourne* (1871), 14 M. I. A., 1, 15; *Juggernath v. Shah Mahomed* (1874), L. R., 2 I. A., 48, 56; *Savaklal v. Ora* (1871), 8 Bom. H. C., o. c., 77, 83.

Void and
voidable
deeds.

The distinction between void and voidable instruments is of importance in this connection. But the question whether a deed is absolutely void or only voidable is sometimes a very difficult one, as it would seem to depend upon the degree of fraud and misrepresentation practised on the grantor. Compare *Parker v. Clarke* (1861), 30 Beav., 54; *Vorley v. Cooke* (1857), 1 Gif., 230; *Ogilvie v. Jeaffreson* (1860), 2 Gif., 353, with *Newport's case* (1690), Ca. t. Holt, 477; *Skin., 423*; *Aldborough v. Tyer* (1840), 7 C. & F., 436, 463; *Judd v. Green* (1875), 33 L. T. (N. S.), 597; see also *Hunter v. Walters*, L. R., 7 Ch., 88; *Lloyd's Bank, Limited v. Bullock* (1896), 2 Ch., 192. For recent cases on the subject, see *King v. Smith* (1900), 2 Ch., 425, and *Powel v. Browne* (1907), W. N., 228, where a mortgage made in favour of the solicitor of the mortgagor without receiving any consideration was assigned to a third person.

Protection of person with notice taking a transfer for value from a transferee without notice. See pp. 449—450, *ante*; see also *Chadwick v. Turner* (1866), L. R., 1 Ch., 310, 319, in which *Ford v. White* (1852), 16 Beav., 12, is distinguished.

For the rights of an assignee of a security whether with or without notice, see the notes to sec. 132, *post*, which, unlike the repealed section 137 which it replaces, does not apply to an assignment of a mortgage-security.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

Enactments relating to contracts to be taken as part of Contract Act.

And sections 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1877.¹

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A)—*Transfer of Property, whether movable or immovable.*

5. In the following sections “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and “to transfer property” is to perform such act.

“Transfer of property” defined.

6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force:

What may be transferred.

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

¹ This portion was added by Act III of 1885, s. 3. The references to the Registration Act must now be

construed as references to Act XVI of 1908.

- (b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.
- (c) An easement cannot be transferred apart from the dominant heritage.
- (d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.
- (e) A mere right to sue¹ * * * * cannot be transferred.
- (f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.
- (g) Stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred.
- (h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) [for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872²], or (3) to a person legally disqualified to be transferee.
- (i) ³Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue or the lessee of an estate under the management of a Court of Wards

¹ The words "for compensation for a fraud or for harm illegally caused" have been omitted by s. 3, Act II of 1900.

² These words have been substitu-

ted for the words "for an illegal purpose," by Act II of 1900.

³ Cl (i) was added by Act III of 1885, s. 4, printed General Acts, Ed. 1898, Vol. V, p. 3.

to assign his interest as such tenant, farmer or lessee.

Compare secs. 460 to 462 of the New York Code.

Nothing in Chapter II is to be deemed to affect any rule of Hindu, Mahomedan or Buddhist law—sec. 2, *supra*.

Property is no doubt a word of very large signification; *Gabriel v. Solomon* (1898), 4 C. W. N., 70, decided under the Official Trustees Act (XVII of 1864), and includes not only what is commonly called an equity of redemption; *Kanti v. Kutubuddin* (1894), 22 Cal., 33; *Beni v. Sourendra* (1896), 23 Cal., 795; dissenting from *Mata Din v. Kazim* (1891), 13 All., 432; but also as the context shows a right of action, as for example, a right to claim specific performance. *Rudin v. Krishna* (1886), 14 Cal., 241. But where the word occurs in debentures, it will not include the capital of the company which was uncalled up to the commencement of the liquidation; though the word 'future' may be added before the term 'property'. *In re Russian, &c., Limited* (1898), 2 Ch., 149; *In re Streatham and General Estates Company* (1897), 1 Ch., 15; cf. *In re British Provident, &c.* (1864), 4 DeG. J. & S., 407. But a company may certainly create a charge upon its uncalled capital by apt words. See the cases cited in note 1. p. 180, *ante*. A right to future maintenance is not property within the meaning of this section, but the fact that the transfer of such right is not recognised by this Act is not conclusive on the question of its validity. *Annapurni v. Swaminatha* (1910), 34 Mad., 7.

What is included in 'Property.'

It has been said that the expression 'Transfer of Property' is not sufficiently wide to include a mortgage, but the fallacy of the remark lies in the assumption that a transfer must of necessity extend to the whole property or interest of the transferor in the subject-matter of the transaction. Ownership, however, is generally divisible and the term transfer is properly applicable to any interest carved either directly or indirectly out of the aggregate known as ownership. Thus a mortgage itself, though it is merely in the nature of a right *in re aliena*, may be transferred by way of security, the transaction being called a sub-mortgage. See the Report of the Indian Law Commission, p. 32; see also the observations of Mahmood, J., in *Gopal v. Pursotum* (1882), 5 All., 121, 137.

The first clause of this section lays down the rule of the English common law that a mere possibility or expectancy not coupled with any interest in or growing out of any existing property cannot be made the subject of a valid transfer. This rule does not conflict with any provision of Mahomedan Law and its application to Mahomedans is not barred by sec. 2 (d). See *Sumuiddin v.*

Mere possibility or expectancy cannot be transferred.

Equitable assignment of such, however, held to be valid in England.

Abdul (1906), 31 Bom., 165, at p. 171. The next cast of a fisherman's net is a stock illustration of a mere expectancy, for though there is a possibility that the man may catch fish, he has no actual or even potential interest in the fish till they are caught. But though there can be no valid transfer of a bare possibility so as to confer on the grantee a right *in rem*, there may be a valid contract to transfer it so as to operate, to use the language of English law, as an equitable assignment, which may bind the property, if, and when it is acquired, no *novus actus* as, for instance, a new deed, being necessary. See in addition to the cases cited at pp. 174—178, *ante*, *Sukhanandan v. Sadaram* (1900), 13 C. P. R., 43; and for a case of an assignment of stock-in-trade in addition to or in substitution for the then existing stock-in-trade, see *Lazarus v. Andrade* (1880), 5 C. P. D., 318. But before the property comes into existence the transfer will in the English law remain only a contract by which the debtor is bound, though the transaction may be in the form of an absolute assignment. *Collyer v. Isaacs* (1881), 19 Ch. D., 342. It follows that if the grantor is released from his liability for the debt, as, for instance, if he obtains his discharge under the insolvency law, he will be discharged from the ancillary covenant to give security on his after-acquired goods. *Collyer v. Isaacs*, *supra*. But there may be an independent covenant to transfer or something amounting to an equitable mortgage which may subsist notwithstanding the discharge of the debt. *Lyde v. Mynn* (1831), 4 Sim., 505; 1 May. & K., 683. A debtor may also assign by way of mortgage any money which may accrue due to him from a third person. *Pooley v. Goodwin* (1835), 4 A. & E., 94; cf. *Exp. Moss* (1884), 14 Q. B. D., 310. But a mortgage of the future gross receipts of a business will not prevail against the title of the trustee in bankruptcy, *Exp. Nichols* (1883), 22 Ch. D., 782. It may be noticed that in England the law relating to assignments by way of mortgage of after-acquired chattels has been virtually abrogated with certain exceptions by the Bills of Sale Act, 1882.

It is hardly necessary to point out that the right of a son or daughter or other heir of a person to inherit that person's property on his death is not an estate in remainder or in reversion in immovable property. It is neither a vested nor a contingent right. So far from being a vested or a contingent right, a right in present or in future, it is, in the language of cl. (a) only 'the chance of an heir-apparent succeeding to an estate' or 'a mere possibility' of succession which cannot be transferred. *Abdool v. Goolam* (1905), 30 Bom., 304. So in the case of impartible property governed by the Mitakshara all the interest which a member of the family of the holder for the time being of the property can claim is a *spes successionis*: *Laliteshwar v.*

Rameshwar (1909), 36 Cal., 481; *Ramasami v. Ramasami* (1907). 30 Mad., 255, 261.

It was held in one case that the interest of a reversioner under the Hindu law is not a mere possibility or expectancy. *Brahmadeo v. Harjan* (1898), 25 Cal., 778; but see *Achhan v. Thakur Das* (1895), 17 All., 125, affirmed; *Sham Sundar v. Achhan* (1898), 25 I. A., 183; 21 All., 71. See also *Nund Kishore v. Kancee Ram* (1902), 29 Cal., 355; 6 C. W. N., 395, where it was held that the interest of a Hindu reversioner expectant upon the death of a Hindu female cannot be validly mortgaged by the reversioner, and that the case of *Brahmadeo v. Harjan* must be taken to have been overruled by the decision of the Privy Council. Cf. *Bahadur v. Mohar* (1901), 29 I. A., 1; 24 All., 95, where the reversioners are described as expectant heirs with *spes successionis*. A mere expectancy cannot be transferred either by way of sale, or otherwise under this section. *Narasimham v. Madavarayudu* (1903), 13 M. L. J., 323; *Manikam v. Ramalinga* (1905), 29 Mad., 120; *Jagan Nath v. Dibbo* (1908), 31 All., 53; 6 A. L. J., 49. The renunciation of their reversionary rights by the reversioners is a transfer of only an expectancy and is a nullity and such renunciation cannot be a good consideration for a contract, *Dhoorjetti v. Dhoorjetti* (1906), 30 Mad., 201; nor can such renunciation, if made in favour of the widow, have the effect of enlarging her interest. *Hargawan v. Baijnath* (1909), 32 All., 88; 7 A. L. J., 11; *Rangappa v. Kamti* (1907), 31 Mad., 366. The law, however, does not strike at agreements by expectant heirs as, for instance, an agreement by expectant heirs under the Hindu law, to divide a particular property in a certain way on the happening of a particular contingency. *Ram Niranjan v. Proyag Singh* (1881), 8 Cal., 138. And a provision in a family-settlement whereby certain Hindu brothers divided the family property amongst themselves and agreed that upon the death of any one of them without male issue his share should pass to the surviving brothers is not a transfer of an expectant interest within the meaning of this clause. *Kanti v. Ali-i-Nabi* (1911), 33 All., 414. So also the relinquishment by a Muhammadan husband by a compromise, which was in the nature of a family-settlement, of his right to succeed as heir to his wife is not obnoxious to the prohibition contained in this section. *Nasir-ul-Haq v. Faiyaz* (1911), 33 All., 457.

Jenkins, C. J.; and Beaman, J., have, however, held, overruling Chandavarkar, J., that, looking at the whole scope of the Act, the intention of the legislature in specially excepting the chance of an heir-apparent from the category of transferable properties was to do away with the distinction between that which according to the

Interest of Hindu reversioner not transferable.

Agreements by expectant heirs.

Agreements relating to expectancies.

phraseology of English lawyers is assignable in law and that which in assignable in equity, and that the principle that equity considers that done which ought to be done cannot be applied as to make an agreement by an heir-apparent bind such chance and extinguish his right of succession on its accrual. *Sumsuddin v. Abdul* (1906), 31 Bom., 165; 8 Bom. L. R., 781. So where two brothers S. and K., who were the reversioners, entered into an agreement during the lifetime of the widow of a deceased brother R., to divide the property left by R., in equal shares after the death of the widow, and S. predeceased the widow, it was held in a suit brought by S.'s son after the death of R.'s widow for a half share of R.'s property, that S. and K. were expectant reversionary heirs and the agreement between them was in effect to divide the reversion when it should fall in. The right of K. was incapable of transfer and the agreement did not operate to vest any property in S., and the suit was not therefore maintainable. *Pindiprolu v. Pindiprolu* (1907), 30 Mad., 486; 17 M. L. J., 505. See also *Rebati v. Ahmed* (1907), 9 C. L. J., 50; *Ramasami v. Ramasami* (1907), 30 Mad., 255, 262.

It may be noticed that though a contract dealing with expectancies is not illegal in England, the court regards all such dealings with some degree of jealousy, and notwithstanding the Sale of Reversions Act, the law administered by the courts of equity in England in setting aside unconscionable bargains remains practically the same as before the Statute. See the notes on *Lord Chesterfield v. Janssen* (1750), 1 W. and T., p. 332, *et seq.* And the voluntary assignment of an expectancy, even though under seal, will not be enforced by a court of equity. *In re Ellenborough* (1903), 1 Ch., 697.

Easements in gross may be mortgaged.

Easements in gross as they are called may be the subject of mortgage, but not easements annexed to the ownership of immovable property, apart from the latter. It may, however, be noticed that the expression 'easements in gross' is not a very accurate expression. *Rangeley v. The Midland, &c., Co.* (1868), L. R., 3 Ch., 306.

Mere personal right or interest cannot be mortgaged.

A mere personal right or interest, as for instance a right of pre-emption, is of course not capable of being mortgaged. *Rajjo v. Lalman* (1882), 5 All., 183; *RamSahai v. Gaya* (1884), 7 All., 107; *Jasudin v. Sakharan* (1911), 36 Bom., 139; 13 Bom. L. R., 1042; but the land subject to pre-emption may be mortgaged. Jones, sec. 136. There is nothing in its nature to prevent the alienation of the life-interest of the grantee in land granted in lieu of maintenance, or Babuana allowance, either by voluntary or involuntary transfers. *Chotti Narain v. Rameshwar* (1902), 6 C. W. N., 796. A sale of *Jajmani Bahis* (books in which lists are kept of pilgrims who have visited the place in past years) is not forbidden by cl. (d) of this section. But

a sale of such books will not convey to the purchaser any right of the judgment-debtor to act as the hereditary guide of the pilgrims mentioned therein. *Gopi v. Jhandu* (1907), 4 A. L. J., 712. For an instance of a personal right created by an agreement to resell some lands; see *Uthandi v. Ragavachari* (1905), 29 Mad., 307. The alienation of a purely usufructuary interest is also forbidden by cl. (d) in which, it may be noticed in passing, the word owner is used in a somewhat unusual sense. See *May v. May* (1872), 44 L. T., 412; cf. *Divali v. Apaji* (1886), 10 Bom., 342; which goes to the very verge of the law if not beyond it. Disting. *Rabbith v. Squire* (1859), 4 DeG. & J., 406; *Coward v. Larkman* (1888), 60 L. T., 1; *Mannox v. Greener* (1872), L. R., 14 Eq., 456.

A mere right to sue.—A claim for damages for breach of contract, after breach, is a "mere right to sue" within the meaning of section 6 (c) and therefore cannot be transferred. *Abu Mahomed v. Chunder* (1909), 36 Cal., 345; 13 C. W. N., 384; *Gopala v. Ramasami* (1910), 7 M. L. T., 228.

Salary of a public officer.—It has been held in England that where there are no public duties attached to an office, the emoluments may be assigned; thus where a Canon of Windsor granted the canonry and profits, &c., to a creditor to secure a certain sum of money, it was held that the security was valid as there was no cure of souls and the only duties were residence within the Castle and attendance in the chapel for a certain number of days in the year. *Grenfell v. Dean, &c., of Windsor* (1840), 2 Beav., 544. Similarly, though there are certain duties annexed to the office of a Fellow, the assignment of the income is not forbidden by public policy as the duties are intended primarily for the benefit of the college and not for the public, except in a secondary and remote sense. It must not, however, be understood that the office itself can be assigned. *Feistel v. King's College* (1847), 10 Beav., 491.

Salary of public officer in certain cases may be mortgaged in England.

Civil, military and political pensions.—The Act makes no distinction between pensions awarded entirely as compensation for past service and allowances, such as half pay, in which a part of the consideration is the liability of the recipient to serve the State again. At common law, the former class of allowances was alienable in England but not the latter. But the law has now been altered by section 141 of the Army Act, 1881. For cases bearing on the true construction of clause (g), see *Lucas v. Harris* (1886), 18 Q. B. D., 127; *In re Sanders* (1895), 2 Q. B., 117; 28 L. J. N. S., Ch., 868. When the money has been received by the person to whom it is payable or his banker it loses its character of retired pay. *Jones & Co. v. Coventry* (1909), 2 K. B., 1029. It is, however, doubtful whether

Inalienability of pensions.

Reason of the
inalienability.

the clause will extend to money paid in respect of commutation of retired pay; *Crowe v. Price* (1889), 22 Q. B. D., 429, or to a voluntary compassionate allowance. *Exp. Webber* (1886), 18 Q. B. D., 111; cf. section 12 of Act XXIII of 1871, and see *Birch v. Birch* (1883), 8 P. D., 163; *Knill v. Dumergue* (1911), 2 Ch. 199. The reason why pensions and salaries of public officers are inalienable is that they are either given to keep up the dignity of the office or to ensure a due discharge of its duties. But this reason does not hold good where any money is payable only to the legal representatives and cannot be appropriated by a person filling a public office during his life-time. *Arbuthnot v. Norton* (1846), 3 M. I. A., 435.

Public com-
panies not
allowed to
create mort-
gages.

In addition to the cases mentioned in the section, it may be noticed that on grounds of public policy, companies formed for the purpose of carrying out public objects in which the community is interested, are not at liberty to create a mortgage which would interfere with the rights of the public. Thus the permanent way of a railway company cannot be mortgaged by them. See in addition to the cases cited in note 2, p. 272, *ante*. *In re Panama, &c., Company* (1870), L. R., 5 Ch., 318.

Unlawful
object or
consideration.

The words "object" and "consideration" in cl. (h) are not synonymous, but distinct in meaning, the word "object" meaning "purpose." *Jaffer v. Budge-Budge Jute Mills Co.* (1906), 33 Cal., 702; *affd.* on app. 34 Cal., 289.

Legally disqualified to be transferee.—See pp. 194—195, *ante*. See section 136, *post*. The question whether an infant may take a mortgage was not decided in *Meghan v. Pran* (1907), 30 All., 63, where although the deed was executed in the name of a minor it was alleged that the mortgage was really made in favour of a joint Hindu family of which the minor was a member. In *Navakotti v. Logalinga* (1909), 33 Mad., 312; 19 M. L. J. 752, it was however held that as a sale necessarily involves the idea of a contract as its foundation and as a minor is incompetent to contract, a sale in favour of a minor is void.

Transfer of Occupancy-holdings.—On the question whether a mortgage is a transfer or not, see p. 72, note 4, *ante*.

Under the Khoti Act (Bom. Act I of 1880) an occupancy-tenant, whose tenancy is not determined, does not forfeit his tenancy by parting temporarily with the possession of his land to another by way of mortgage and the mortgagee in possession cannot be treated as a trespasser. *Yess v. Sakharam* (1905), 30 Bom., 290. But if an occupancy-ryayat in Bengal not authorized to transfer his holding executes an usufructuary mortgage of the holding, places the mort-

gagee in possession, and abandons the holding, the landlord is entitled to eject the mortgagee as a trespasser. *Rasik v. Bidhumukhi* (1906), 33 Cal. 1094; 4 C. L. J., 306. See also *Krishna v. Miran* (1903), 3 C. L. J., 222; 10 C. W. N., 499; cf. *Rajendra v. Chandra* (1907), 12 C. W. N., 878; *Baroda v. Hemlata* (1908), 13 C. W. N., 242, overruled on another point; *Mohadeo v. Pachkari* (1911), 16 C. W. N., 322. A *mandadari* tenure is not transferable. *Kedur v. Naipal* (1911), 34 All., 155. A mortgage of an occupancy-tenancy executed prior to the operation of the Agra Tenancy Act (I of 1904), is a perfectly valid transaction and is not affected by the Act. *Ram Pargas v. Subha* (1910), 32 All., 628.

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

Persons competent to transfer.

Competent to contract.—See cases in pp. 181—184, *ante*.

Whether a direction to sell would authorize a mortgage, see pp. 184—186, *ante*; and as to the construction of powers generally, see pp. 186—187, *ante*. As to the authority of mercantile agents, see pp. 187—188, *ante*; and as to the power of a partner to make a mortgage, see p. 188, *ante*. With regard to the authority of a corporation to mortgage its property, see pp. 189—190, *ante*. As regards the authority of executors or administrators, see pp. 190—192, *ante*; see also *Haripriya v. Sarai* (1899), 3 C. W. N. ccxii, where it is said by one of the judges that section 12 of the Probate and Administration Act (V of 1881) only validates the acts of executors previous to the grant of probate when such probate remains in force and is not revoked. For the effect of grant of probate by mistake, as also where the will was a forgery, see cases cited in note 2, 191, *ante*. It should be here noticed that no application can be made under section 90 of the Probate and Administration Act, if the estate has been fully administered and there are no debts or legacies of the deceased to be paid. Thus, a Hindu widow who has fully administered the estate of her deceased husband can sell or mortgage the estate for purposes for which she would be justified in doing so under the Hindu law and is neither bound nor entitled to apply to the court for leave. In the *goods of Nursing Chundar* (1899), 3 C. W. N., 635 *Lakshmi v. Nanda* (1906), 9 C. L. J., 116.

Extent of powers of such persons.

Extent of
powers of
such persons
continued.

As regards trustees of religious endowments, see p. 194, *ante*; and as regards a mortgage made by an insolvent, see the authorities cited at p. 194, *ante*. With regard to mortgages by infants, see pp. 181-183, *ante*, and with regard to the powers of the guardian of an infant or the committee of a lunatic, see pp. 183-184, *ante*. A manager of a minor's estate or guardian of the minor cannot make a binding contract for purchase of immovable property. *Mir Sarwarjan v. Fakhruddin* (1911) 39 I. A. 1; 39 Cal., 232. As to fraudulent misrepresentation by the minor as to his age, see cases cited at pp. 181-182, *ante*, and *Jagar Nath v. Latta* (1908), 31 All., 21, where Banerji, J., held that whether or not the doctrine of estoppel applies to a contract entered into by a minor, where persons under age by false and fraudulent misrepresentations as to their age induce others to purchase property from them, they are liable in equity to make restitution to the purchasers for the benefit they have obtained before they can recover possession of the property sold. A receiver has under O. 40, r. 1 (d), Code of Civil Procedure, power to raise money on mortgage, if it is necessary to do so for the protection of the estate. See *Poreshnath v. Omerto* (1890), 17 Cal., 614, and cases cited in note 2, p. 411, *ante*. A manager appointed under section 95 of the Bengal Tenancy Act has also the power to create a mortgage, which would over-ride an incumbrance created by the owners. See p. 411, *ante*. But a temporary injunction under O. 39, r. 1 (b), [section 492 (b) of the old Code] of the Code of Civil Procedure will not invalidate a mortgage by the defendant. *The Delhi, &c., Bank, Ltd. v. Ram* (1887), 9 All., 497.

A taluqdar who has been declared "a disqualified proprietor" under the provisions of the Oudh Land Revenue Act (XVII of 1876) and whose estate has been placed under the management of the Court of Wards is not prohibited by the Act from contracting debts or borrowing money without the sanction of the Court of Wards, and it was not intended to interfere with the personal status or rights of an adult disqualified proprietor, who is neither an idiot nor a lunatic, except as regards the management of his property or anything expressly prohibited. But he cannot without the sanction of the Court of Wards create any charge upon the property. *Dhanipal v. Maneshar* (1906), 33 I. A., 118; 28 All., 570. A mortgage executed by a mortgagor who was at the time disqualified under section 8 of the Jhansi Incumbered Estates Act, 1882, is void, and section 43 of the Transfer of Property Act cannot be invoked in his aid to empower the mortgagee to bring a suit for foreclosure after the mortgagor's disability has ceased. *Radha v. Kamod* (1907), 30 All., 38.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Operation of transfer.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the movable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

Compare section 6 of the Conveyancing Act, 1881, and Art. 1617 N. Y. Code, which provides that a mortgage is a lien upon everything that would pass by a grant of the property.

Unless a different intention is expressed or necessarily implied.—See *Southport Banking Co. v. Thompson* (1887), 37 Ch. D. 64; *Pandurang v. Bhimrav* (1897), 22 Bom., 610. All the interest which the transferor is then capable of passing.—See cases cited in note 4, p. 169, and also pp. 281-285, *ante*. Unless the operation of a mortgage is expressly limited, it will pass the whole of the interest of the mortgagor in the property, including any reversionary interest which he then has in it. Cf. *Kishen Geer v. Rungeet* (1870), 14 W. R., 379. But a mortgage of all the land which the mortgagor has in a certain town will not include land to which he has only a possibility of a reversion on the non-performance of a condition subsequent. Jones, secs. 138, 141. Care should be always taken to define clearly the nature and extent of the estate or interest intended to be mortgaged as the security might otherwise be cut down

Extent of interest transferred

to the prejudice of the mortgagee; see for instance, *Grieneson v. Kirsoff* (1842), 5 Beav., 283; for general words, the absence of which may now be supplied by the provisions of this section, will only pass that which the grantor had to give at the time of the grant and will not extend to anything which he might subsequently acquire: *Booth v. Alcock* (1873), L. R., 8 Ch., 663. Whether a mortgage of land or building used for the purpose of a trade or business will include such trade or business, see *County, &c., Bank v. Rudry Merthyr Steam and Colliery Co.* (1895), 1 Ch., 629; disting. *Whitley v. Challis* (1892), 1 Ch., 64, where it was held that the mortgage of a hotel simply meant the building and did not comprise the business. See also p. 282, *ante*. For the right of a mortgagee of a public house to the license, see *Garrett v. Justices of Middlesex* (1884), 12 Q. B. D., 620; disting. *Manifold v. Morris* (1839), 5 Bing. N. C., 420; *Exp. Reid* (1833), 1 D. & C., 250, see also the notes to sections 70 and 71, *post*.

Easements annexed to a house.—Where a person purchased a part of a house which his vendor had previously mortgaged giving the mortgagee the use of a certain passage who was afterwards paid off, it was held that he must be taken to have purchased the mortgagee's interest in the house including the right by way of easement over the passage; though the mortgagee was no party to the conveyance, but merely signed a receipt for the mortgage-money endorsed on the deed. *Vishnu v. Rango* (1893), 18 Bom., 382. As to the meaning of the word "annexed," see *Wutzler v. Sharpe* (1893), 15 All., 270.

Attached to the earth.—See the notes to section 3, *supra*. Generally speaking a mortgage of land, unless the contrary appears, will comprehend not only the ground or soil but also water covering its surface, mines and minerals thereunder, timber and trees as well as crops growing thereon, and houses and buildings standing upon it. *Faqueer Sonar v. Khuderun* (1870), 2 N.-W. P., 251; *Mahomed Ali v. Bolakie* (1875), 24 W. R., 330; cf. *Pandurang v. Bhimrav* (1897), 22 Bom., 610. In short, a mortgage of land will carry with it everything attached to the soil and in the case of fixed machinery everything necessary for its working; for instance, articles which are essential parts of the machine will pass, though unattached. *Parbutty v. Woomatoru* (1875), 14 B. L. R., 201; *Miller v. Brindabun* (1879), 4 Cal., 946. But machines will not pass by a mortgage of the soil or a building, where, although they are placed in prepared receptacles, there is no annexation. *Hutchinson v. Kay* (1857), 23 Beav., 413; *Ex parte Asbury* (1869), L. R., 4 Ch., 630, 638. See also *Lyon & Co. v. London, &c.* (1903), 2 K. B., 135; *Reynolds v. Ashby* (1904), A. C., 466; *In re Samuel Allen, &c.* (1907), 1 Ch., 575; *Ellis v. Glover, &c.* (1908), 1 K. B., 388.

gal
incidents
of property
transferred;
easements.

Things
attached
to the earth.

What will
carry with
a mortgage
of land.

"It is very difficult," says Mr. Dart, "to determine what articles" are fixtures, properly so called, and what are mere movable chattels. Dart, p. 559. Trade fixtures, which have been annexed to the freehold, not with the view of improving the inheritance, but solely for the purposes of trade, will, unless expressly excluded, pass by a mortgage of the freehold. What are fixtures and what are movable chattels.

It should be noticed that the principle of *In re Yates* (1888), 38 Ch. D., 112, under which a conveyance of land and buildings used for a business passes all the fixed trade machinery on the premises, though not expressly mentioned, applies equally where the conveyance expressly mentions the fixed trade machinery, either by reference to a schedule or otherwise. *In re Brooke* (1894), 2 Ch 600; *disting. Small v. National Bank of England* (1894), 1 Ch., 686. And see pp. 283—286, *ante*.

Other legal incidents.—See p. 282, *ante*.—A mortgage of a ship will carry all articles, necessary to the navigation of the ship, which are on board at the time of the mortgage, or are afterwards substituted for them. *Coltman v. Chamberlain* (1890), 23 Q. B. D., 328; cf. *In re Salman and Woods* (1885), 2 Morr. Bkey., 137. As to the right of the mortgagee to the benefit of a subsisting insurance, see the notes to sections 49, 72 and 76, *post*. Instances of other legal incidents.

An assignment of the debt by deed, by writing simply or by parol, will draw the security after it as a consequence, and as being appurtenant to the debt. The one is regarded as the principal, and the other the accessory, and *omne principale trahit ad se accessorium*. It was held under the Code of Civil Procedure, 1882, that a mortgage-debt was movable property within the meaning of section 268 of the Code, and its sale in execution carried with it the right to proceed against the mortgaged property even though there had been no attachment and sale under section 274 of that Code. *Tarvadi v. Bai Kashi* (1901), 26 Bom., 305. Pp. 71—72, *ante*; see also Kent's Commentaries, Vol. IV, pp. 228, 229, citing in addition to American authorities, *Richards v. Syms*, 3 Eq. Cas. Abr., 617; Barnard's Ch. Rep., 90, s. c., *Martin v. Mordlin*, 2 Burr., 978; cf. *Exp. Smith* (1835), 2 D. & C., 271. Where a person executed a voluntary settlement by which he assigned certain debts which were due to him, but made no express assignment of the securities for such debts nor gave them up to the trustees, it was held that an assignment of the securities might be implied. *In re Patrick* (1891), 1 Ch., 82. And it has been held in an American case that an assignment of a portion of the debt would carry with it a *pro rata* portion of the mortgage. *Keys v. Wood*, 21 Vt. R., 332, cited in Kent's Commentaries, Vol. 4, p. 229. For a case where a promissory note con- What is carried with an assignment of a debt.

tains a memorandum importing that a collateral security has also been given, see *Wise v. Charlton* (1836), 4 A. and E., 786. According to the Madras High Court the word "debt" in this clause should be confined to such debts as fall within the general category of actionable claims. *Arunachellam v. Subramanian* (1906), 30 Mad., 236.

Assignment of
mortgagee's
interest.

But the assignment merely of the interest of the mortgagee in the land without an assignment of the debt is said to be without meaning or use. And it has been held in England that money charged on land does not pass under a devise of land, and that if a testator specifically devises a particular estate, which is only a mortgage-estate and not the money charged on it, the devisee is only a trustee for the persons entitled to the money. *In re Clowes* (1893), 1 Ch., 214; *Strade v. Russel* (1701), 2 Vern., 621, 624; cf. *Casborn v. Scarfe* (1737), 1 Atk., 603. But it seems that if the testator was a mortgagee in possession, the debt would pass to the specific devisee. *In re Carter* (1900), 1 Ch., 801. See also the remarks of Lindley, L. J., in *In re Lowman* (1895), 2 Ch., 354. And it has been laid down still more broadly by Stirling, J., that as a mortgage consists partly of the estate in the land, and partly of the debt, he who has the estate, is entitled to the benefit of the bond or covenant, which may accompany the mortgage, for it is impossible to say the mortgage passes and is well assigned to one person, and yet the debt remains in another. Therefore by the assignment of the mortgage, the debt necessarily passes as incident to it. *In re Richards* (1890), 45 Ch. D., 589; cf. *Padmanabha v. Shanakoti* (1879), 2 Mad., 119. See also *Jones v. Gibbons* (1804), 9 Ves., 411. But though, as a rule, a mortgage cannot be transferred apart from the collateral securities so as to enable the mortgagee to sue on the latter—*Walker v. Jones* (1865), L. R., 1 P. C., 50,—where a mortgage is accompanied by a promissory note and such note gets into the hands of a *bonâ fide* indorsee for value without notice, the mortgagor will be liable to pay the indorsee, notwithstanding a transfer of the mortgage by the original mortgagee to another person. *Glasscock v. Balls* (1889), 24 Q. B. D., 13.

Oral transfer.

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

As to mortgages, see section 59, *infra*.

Condition
restraining
alienation.

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting

with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Restriction repugnant to interest created.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immovable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

12. Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Condition making interest determinable on insolvency or attempted alienation.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Transfer for benefit of unborn person.

Illustration.

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

Rule against
perpetuity.

14. No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Transfer to
class, some of
whom come
under sec-
tions 13 and
14.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails as regards the whole class.

Transfer to
take effect on
failure of
prior transfer.

16. Where an interest fails by reason of any of the rules contained in sections 13, 14 and 15, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

Transfer in
perpetuity for
benefit of
public.

17. The restrictions in sections 14, 15 and 16 shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

Direction for
accumulation.

18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immovable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one

year next following such date ; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

Vested interest.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

When unborn person acquires vested interest on transfer for his benefit.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former

Contingent interest.

case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

Transfer to members of a class who attain a particular age.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Transfer contingent on happening of specified uncertain event.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Transfer to such of certain persons as survive at some period not specified.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Illustration.

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

Conditional transfer.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or

is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Illustrations.

(a) *A* lets a farm to *B* on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) *A* gives Rs. 500 to *B* on condition that he shall marry *A*'s daughter *C*. At the date of the transfer *C* was dead. The transfer is void.

(c) *A* transfers Rs. 500 to *B* on condition that she shall murder *C*. The transfer is void.

(d) *A* transfers Rs. 500 to his niece *C* if she will desert her husband. The transfer is void.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Fulfilment of condition precedent.

Illustrations.

(a) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *E* dies. *B* marries with the consent of *C* and *D*. *B* is deemed to have fulfilled the condition.

(b) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *B* marries without the consent of *C*, *D* and *E*, but obtains their consent after the marriage. *B* has not fulfilled the condition.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a par-

ticular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a) *A* transfers Rs. 500 to *B* on condition that he shall execute a certain lease within three months after *A*'s death, and, if he should neglect to do so, to *C*. *B* dies in *A*'s life-time. The disposition in favour of *C* takes effect.

(b) *A* transfers property to his wife; but, in case she should die in his life-time, transfers to *B* that which he had transferred to her. *A* and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of *B* does not take effect.

Ulterior transfer conditional on happening or not happening of specified event.

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27.

Fulfilment of condition subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs. 500 to *B*, to be paid to him on his attaining his majority or marrying, with a proviso that, if *B* dies a minor or marries without *C*'s consent the Rs. 500 shall go to *D*. *B* marries when only 17 years of age, without *C*'s consent. The transfer to *D* takes effect.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to *B* for her life, and, if she do not desert her husband, to *C*. *B* is entitled to the farm during her life as if no condition had been inserted.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

31. Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(a) *A* transfers a farm to *B* for his life, with a proviso that, in case *B* cuts down a certain wood, the transfer shall cease to have any effect. *B* cuts down the wood. He loses his life-interest in the farm.

(b) *A* transfers a farm to *B*, provided that, if *B* shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. *B* does not go to England within the term prescribed. His interest in the farm ceases.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest. Such condition must not be invalid.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act. Transfer conditional on performance of act, no time being specified for performance.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled. Transfer conditional on performance of act, time being specified.

Election.

**Election
when neces-
sary.**

35. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultanpur is the property of *C* and worth Rs. 800. *A* by an instrument of gift professes to transfer it to *B*, giving by the same instrument Rs. 1,000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, *A* dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to *B*.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to

transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Apportionment.

Apportionment of periodical payments on determination of interest of person entitled.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

This as well as the next section are applicable to transfers by way of mortgage, where the mortgagee is entitled to receive the rents.

Apportionment of benefit of obligation on severance.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose :

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes, unless and until the Local Government by notification in the official Gazette so directs.

Illustrations.

(a) *A* sells to *B*, *C* and *D* a house situate in a village and leased to *E* at an annual rent of Rs. 30 and delivery of one fat sheep, *B* having provided half the purchase-money and *C* and *D* one quarter each. *E*, having notice of this, must pay Rs. 15 to *B*, Rs. 7½ to *C*, and Rs. 7½ to *D*, and must deliver the sheep according to the joint direction of *B*, *C* and *D*.

(b) In the same case, each house in the village being bound to provide ten days labour each year on a dyke to prevent inundation, *E* had agreed as a term of his lease to perform this work for *A*. *B*, *C* and *D* severally require *E* to perform the ten days' work due on account of the house of each. *E* is not bound to do more than ten days' work in all, according to such direction as *B*, *C* and *D* may join in giving.

(B)—Transfer of Immovable Property.

38. Where any person, authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Transfer by person authorized only under certain circumstances to transfer.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes, neither religious, nor charitable, to sell a field, part of such property, to *B*. *B* satisfies himself by reasonable enquiry that the income of the property is insufficient for *A*'s maintenance and that the sale of the field is necessary and, acting in good faith, buys the field from *A*. As between *B* on the one part and *A* and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

39. Where a third person has a right to receive maintenance or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consider-

Transfer where third person is entitled to maintenance.

ation and without notice of the right, nor against such property in his hands.

Illustration.

A, a Hindu, transfers Sultanpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultanpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultanpur. She has no claim on the villages transferred to C.

Hindu widow's
claim for
maintenance.

This section contains a very important provision which is applicable to a Hindu widow's claim for maintenance. It has been asked, does it constitute an equitable lien; and if so, does it bind the estate in the hands of a *bonâ fide* purchaser for value? Would notice of the mere existence of a right to maintenance be sufficient to bind the purchaser, or must the notice be of the existence of a charge actually created and binding the estate; in other words, must it be notice of a claim which has actually matured into a lien? The whole law on this subject which was in a somewhat tangled state was reviewed by Mr. Justice West in the case of *Lakshman v. Satyabhama* (1877), 2 Bom., 494; and the section substantially proceeds on the lines of that judgment. See *Jogendra v. Fulcumari* (1899), 27 Cal., 77; *Ram Kunwar v. Ram Dai* (1900), 22 All., 326; *Bhartpore v. Gopal* (1901), 24 All., 160. The intention to defeat the right involves the idea of a fraudulent intention, *Digambari v. Dhan Kumari* (1906), 10 C. W. N., 1074, Mayne, secs. 460-463; see also *Shamlal v. Banna* (1882), 4 All., 296; *Monsha Devi v. Jiwan* (1884), 6 All., 617, and the cases cited in note 3, p. 137, *ante*. And compare the right of a creditor to follow the assets of a deceased debtor. *Greender v. Mackintosh* (1879), 4 Cal., 897; *Bazayet Hossein v. Dooli* (1878), 5 I. A., 211; 4 Cal., 402. Where in execution of a decree obtained by the creditor against his debtor in respect of an obligation incurred by the latter as surety, the decree-holder attached a house and bought it himself and applied to be placed in possession and the debtor's widow claimed that she had a right of residence and that she could not be ejected, it was held that the widow had no right of residence in priority of the right of her husband's creditors to be paid out of the assets and that the husband's debt would bind the widow and defeat her right of maintenance, including residence. *Jayanti v. Alamelu* (1902), 27 Mad., 45; 12 M. L. J., 270. But this section will not protect a transferee for consideration where the property has already been

declared by a decree of court subject to a charge for maintenance. *Kuloda v. Jogeshar* (1899), 27 Cal., 194. *Maina v. Bachchi* (1906), 28 All., 655 ; 3 A. L. J., 551.

The provision for marriage of which the section speaks evidently refers to the provision for the marriage of maiden girls in the Hindu law, which is commonly treated as a charge on the inheritance. But provisions for advancement in the technical sense are unknown in this country.

40. Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or

Burden of obligation imposing restriction on use of land, or of obligation annexed to ownership but not amounting to interest or easement.

where a third person is entitled to the benefit of an obligation arising out of a contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to B. While the contract is still in force, he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

Where a mortgagee, at the time of his mortgage is aware of circumstances which ought to have put him on enquiry, and such enquiry if made would have revealed the existence of an agreement by the mortgagor to mortgage the property to a third party, the mortgagee's rights will be postponed to the rights of such third party. *Kameshwaramma v. Silaramanuja* (1905), 29 Mad., 177.

41. Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and

Transfer by ostensible owner.

transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

For a case under this section, see *Karamat v. Samiuddin* (1886), 8 All., 409. In England though a trustee can pass a good title to a purchaser for value without notice by a conveyance of the legal estate, a merely equitable title created by him will not displace the title of the *cestui que trust* in the absence of any negligence on the part of the latter. *Carrut v. Real and Personal Advance Co.* (1889), 42 Ch. D., 263. Cf. *In re Morgan*; *Pillgrem v. Pillgrem* (1881), 18 Ch. D., 93. See also p. 423, *ante*.

This section it has been said, is the statutory qualification and restriction of the general law of estoppel contained in section 115 of the Evidence Act, which is a rule of proof. It imposes upon purchasers of immovable property the duty of exercising reasonable care and diligence. *Hoorabai v. Aishabai* (1910), 12 Bom. L. R., 457.

Reasonable care.—A Government official owning zamindari property in the district in which he was employed, caused that property to be recorded in the revenue-papers in the names of his young sons. The sons sold portions of the property and mortgaged others. The vendee and mortgagee satisfied himself that the property had been recorded for some years in the names of the sons, but there stopped and made no further enquiries as to whether the property really belonged to the sons or not. If he had enquired into his transferors' title, he would have ascertained that the property was acquired in the names of the transferors when they were children of tender years and this would have led to further discoveries. It was held that the transferee, although acting in good faith, had not taken reasonable care to ascertain that the transferor had power to make the transfer. *Partab v. Saiyida* (1901), 23 All., 442. A purchaser is not justified in shutting his eyes and buying recklessly from a vendor without any enquiry and resisting the real owner on the ground that the real owner did not come forward. Reasonable care is to be expected from every one, who claims to have purchased free from a really existing right, equitable or legal, and when the purchaser has failed to exercise it, he cannot claim that the real owner should be called on to prove his good faith and innocence instead. *Zungabai v. Bhawani* (1907), 9 Bom. L. R., 388. This section requires that

the transferee from the ostensible owner should have taken the transfer in good faith and after due enquiry. Mere belief in the representation of the transferor would not be sufficient. *Pandiri v. Karumoory* (1910), 8 M. L. T., 285.

Where certain mortgagees took a mortgage from a person who was in possession, was recorded as owner, and held the title-deeds of the property, it was held that there was nothing in the transaction to put the mortgagees on enquiry as to the real title to the property, *Khwaja v. Muhammad* (1904), 26 All., 490. A person executed a deed of sale in favour of his wives. The ladies then mortgaged the property and the deed was attested by the husband and his son. Subsequently the property was sold by the mortgagors to the mortgagee. After the sale a creditor attached and sold the property in execution of a decree for money against the heirs of the husband and purchased it himself and obtained possession. It was held that it was not open to the execution-purchaser to question the validity of the sale made by the husband in favour of his wives, and that the provisions of this section were applicable. *Mutsaddi v. Daleep* (1910), 7 A. L. J., 967.

Consent, express or implied.—The consent referred to must be an intelligent consent and not one brought about by misapprehension as to legal rights. *Dungariya v. Nand* (1906), 3 A. L. J., 534. Where the guardian of a minor Hindu mortgaged the minor's property, as his own, it was held that this section which relates to transfers by ostensible owners has no application, where the owner is a minor incapable of giving consent. *Dalibai v. Gopibai* (1902), 26 Bom., 433; 4 Bom. L. R., 105; *Abdullah v. Bundi* (1911), 8 A. L. J., 1084. The guardian of a minor owner of immovable property is incapable of consenting, even though such consent be express, to a third person holding himself out as owner of the minor's property, so as to enable a transferee from such person to claim the benefit of this section. *Dambar v. Jawitri* (1907), 29 All., 292.

42. Where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Transfer by person having authority to revoke former transfer.

Illustration.

A lets a house to *B*, and reserves power to revoke the lease if, in the opinion of a specified surveyor, *B* should make a use of it detrimental to its value. Afterwards *A*, thinking that such a use has been made, lets the house to *C*. This operates as a revocation of *B*'s lease subject to the opinion of the surveyor as to *B*'s use of the house having been detrimental to its value.

Transfer by unauthorized person who subsequently acquires interest in property transferred.

43. Where a person erroneously represents that he is authorized to transfer certain immovable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu, who has separated from his father *B*, sells to *C* three fields, *X*, *Y* and *Z*, representing that *A* is authorized to transfer the same. Of these fields *Z* does not belong to *A*, it having been retained by *B* on the partition; but on *B*'s dying *A* as heir obtains *Z*. *C*, not having rescinded the contract of sale, may require *A* to deliver *Z* to him.

Where a person erroneously represents, &c.—The benefit of the section can be claimed only by the person who has acted on the erroneous representation of the party, whose subsequently acquired interest he claims. *Pandiri v. Karumoory* (1910), 34 Mad., 159. Although the section speaks only of erroneous representations, it is clear that it includes fraudulent misrepresentations. As the right conferred by this section may not be enforced against *bonâ fide* purchasers for value, the last clause containing a legislative reversal of the decision of the Allahabad High Court in the case of *Mahomed v. Karamat* (1872), 4 N.-W. P., 11, the provisions of the Act are not open to the very strong observations made by the Master of the Rolls on the common law doctrine of estoppel in *General, &c., Company v. Liberator, &c., Society* (1878), 10 Ch. D., 15. But such right may be enforced against the heir. *Radhey v. Mohesh* (1885), 7 All., 864; *Jones v. Kearne* (1841), 1 Dr. & War., 159; but see *Morse v. Faulkner* (1792), 1 Anst., 11. It should be noticed that an interest fraudulently acquired by the grantor will not pass to the grantees. *Eyre v. Burmester* (1862),

10 H. L. C., 90. The rule will also not apply when the sale is in *invitum*. *Alukmonee v. Bancee* (1878), 4 Cal., 677.

A person who had merely a *ghatwali* interest in certain land mortgaged it on the representation that it was his *jaigir* and he subsequently got a *mokarari* title to it. It was held that the *mokarari* interest of the mortgagor passed to the mortgagee. The rule of law underlying section 43, is that as between the transferor and the transferee, the transferor cannot set up a title subsequently acquired to the land transferred by him, if he had induced the transferee to pay money for the transfer. *Mokhoda v. Umesh* (1907), 7 C. L. J., 381. See also *Ram Narain v. Mohanian* (1903), 26 All., 82.

Application of
the rule to
mortgages.

The principle embodied in this section will be applied where a mortgagor attempts to set up a prior mortgage as a shield against puisne incumbrancers, by himself paying off such prior mortgage or purchasing the mortgaged property in execution of a decree on the mortgage. *Manjappa v. Krishnayya* (1905), 29 Mad., 113. Where a person transferred a property, which he had no right to do, which property was subject to a common mortgage along with other property of the transferor, and the transferor then paid off the mortgage and obtained a lien on the co-mortgagor's share the transferee, it was held, became entitled to that lien as soon as it came into existence. The effect of the transfer was, according to this section, to make it operate, at the option of the transferee, on the interest which the transferor subsequently acquired in the property. *Danappa v. Yamnappa* (1902), 26 Bom., 379.

The mother and guardian of her infant son contracted to sell a piece of land as such guardian undertaking to take out a certificate of guardianship and permission to sell from the District Judge, but before the certificate was applied for the infant died, and the mother having succeeded to the property by right of heirship refused to sell it. It was held that this section did not apply, as there was no erroneous representation made by the mother. *Rashmoni v. Soorja* (1905), 32, Cal., 832; 2 C. L. J., 6. This section cannot be invoked in aid of a mortgagee who took a mortgage at a time when the mortgagor was disqualified under the Jhansi Incumbered Estates Act, 1882, after the disability of the mortgagor has ceased. *Radha v. Kamol* (1907), 30 All., 38.

There must be
erroneous
representation.

This section does not apply if a transfer is without consideration, and even where there is consideration, it must be shown that there was an erroneous representation by the transferor. *Jagan Nath v. Dibbo* (1908), 31 All., 53.

A mortgagee of Deshgat vatan knew that the property which was mortgaged to him was land appurtenant to an hereditary office* and inalienable beyond the life-time of the incumbent. Subsequently to the mortgage, the estate of the mortgagor was enlarged so as to be alienable in the life-time of the holder. After such enlargement, the mortgagee having claimed to hold the property against the heir of the mortgagor, it was held that the mortgagee took only such estate as the holder of the vatan property was capable of conveying to the mortgagee at the time of the mortgage and could not claim to retain the property after the death of the mortgagor, as there was no representation made by the grantor and acted upon by the grantee. *Gangabai v. Baswant* (1909), 34 Bom., 175; 12 Bom. L. R., 143.

For the English Law on the subject, see Dart, pp. 818—822; Sugden (13th Edition), pp. 297—612; cf. *Keate v. Phillips* (1881); 18 Ch. D., p. 560; see also Bigelow on Estoppel, 413; and p. 295, *et. seq.*, *ante*. It has been recently held that if an assignor with a defective title purports and intends to assign property for value, any interest subsequently acquired by him in that property is available in equity to make the assignment effectual, even though the defect in the title is apparent on the face of the assignment. *In re Bridgwater's Settlement* (1910). 2 Ch., 342. The right of a mortgagee to treat the after-acquired property as subject to his security can of course be exercised only so long as the relation of mortgagor and mortgagee lasts.

Transfer by
one co-owner.

44. Where one of two or more co-owners of immovable property legally competent in that behalf, transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

The provisions of this section would seem to be applicable to mortgages.

45. Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

It would seem that the transferees will take not as joint-tenants but as tenants-in-common, there being no distinction between purchasers and mortgagees. See p. 452, *ante*. See also the observations of their Lordships of the Privy Council in *Jogeswar v. Ramchand* (1896), 23 I. A., 37; 23 Cal., 670. For the English law on the subject, see *Riden v. Vallier* (1751), 2 Ves., 252; 3 Atk., 730; *Edwards v. Fashion* (1712), Pr. Ch., 332. Cf. *Aveling v. Knipe* (1815), 19 Ves., 444; *Ronson v. Preston* (1858), 4 K. & J., 505. Section 61 of the Conveyancing Act, 1881, reverses the old presumption in the case of mortgages.

46. Where immovable property is transferred for consideration by persons having distinct interests therein the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations.

(a) *A*, owning a moiety, and *B* and *C*, each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, *A* is entitled to an eighth share in Lalpura, and *B* and *C* each to a sixteenth share in that mauza.

(b) *A*, being entitled to a life-interest in mauza Atrali and *B* and *C* to the reversion, sell the mauza for Rs. 1,000. *A*'s life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. *A* is entitled to receive Rs. 600 out of the purchase-money, *B* and *C* to receive Rs. 400

Transfer by
co-owners of
share in com-
mon property.

47. Where several co-owners of immovable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares.

Illustration.

A, the owner of an eight-anna share, and *B* and *C*, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to *D*, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of *A*, and half-an-anna share from each of the shares of *B* and *C*.

Priority of
rights created
by transfer.

48. Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

This is only a paraphrase of the maxim *qui prior est tempore potior est jure*, but such priority may be forfeited in various ways. See pp. 416—420, *ante*. See also secs. 78 and 79 *infra*. A mortgage of future property being merely in the nature of an agreement will not fall under this section, and according to the Bombay High Court, an equitable mortgage is also not within the rule. *Dayal v. Jivraj* (1875), 1 Bom., 237, but this can only be on the ground that the transaction is merely an agreement to transfer and not an actual transfer. See p. 380, *ante*.

49. Where immovable property is transferred for consideration, and such property or any part thereof is at the date of transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Transferee's
right under
policy.

See the dissentient judgment of James, L. J., in (1881) *Rayner v. Preston*, 18 Ch. D., 1. Dr. Whitly Stokes points out that this section agrees with *Garden v. Ingram* (1852), 23 L. J., Ch., 478, and is right at variance with *Poole v. Adams* (1864), 12 W. R. (Eng.), 683. Anglo-Indian Codes, Vol. I, p. 729. But in *Garden v. Ingram* there was a distinct provision in the lease that any money received on the policy should be laid out in reinstating the premises. In the absence of any such provision, the benefit of the insurance cannot be claimed by a stranger, the contract being treated as one for mere personal indemnity. Dart, 193.

For the rights and liabilities of mortgagees in connection with insurance, see secs. 72 and 76 of the Act.

50. No person shall be chargeable with any rents or profits of any immovable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Rent bona fide
paid to holder
under defec-
tive title.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

This section would not protect a tenant who pays his rent in advance to a mortgagor. The reason is, a tenant who pays rent before it is due does not do so in fulfilment of his obligation, but merely makes an advance to the landlord on the understanding that when the rent falls due, such advance shall be treated as payment. *De Nicholls v. Saunders* (1870), L. R., 5 C. P., 589; *Cook v. Guerra* (1872), L. R., 7 C. P., 132.

Rent paid in
advance.

Where, however, there was a special provision in the lease, which was registered, to the effect that the lessee should be bound to pay to the lessor on demand any portion of the rent in advance and the lessee had paid rent in advance in accordance with it, the claim of an auction-purchaser of the lessor's interest, purchasing subsequently to the payment, for the rent so paid was disallowed on the ground that the lease being a registered instrument, the purchaser ought to have made enquiries and that the rent had been paid *bona fide* in advance. *Nand Kishore v. Anwar* (1907), 30 All., 82. This section was applied to a case where a tenant paid rent in good faith to a person who was not the heir of the last holder after the death of the latter. It was held that the language of the section is general and no assignment by the lessor during the tenancy was necessary. *Kaveriamma v. Lingappa* (1908), 33 Bom., 97.

Improvements
made by *bona
fide* holders
under defec-
tive titles.

51. When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

A mortgagee in possession who must be aware of the imperfection of his title is not entitled to rely on the provisions of this section. *Ramalinga v. Samiappa* (1889), 13 Mad., 15. For the case of a mortgagor retaining possession after the expiration of the time

allowed to him for payment of the sum due from him, see *Land Mortgage, &c., India v. Visnu* (1878). 2 Bom., 670.

This section requires merely that the transferee mentioned therein shall have made the improvements believing, in good faith, that he is absolutely entitled to the property. There is nothing in the wording of the section to justify the contention that the real owner must, at the time of the expenditure, know that the land belongs to him. *Collier v. Baron* (1905), 2 N. L. R., 34.

A belief in good faith under this section means not only acting honestly and fairly but includes due enquiry. Where a person consciously avoids making an enquiry, though he may be said to have a belief in the matter, it would not be a belief in good faith. *Abhay v. Attarmoni* (1908), 13 C. W. N., 931. Although good faith within the meaning of this section is not necessarily precluded by facts showing negligence in investigating the title, wilful abstention from making any enquiries would show a belief to be not a belief in good faith. *Nanjappa v. Peruma* (1909), 32 Mad., 530. As to whether there may be good faith although there was actual notice, see *Maniklal v. Manchershhi* (1876), 1 Bom., 269. See also *Nanjamma v. Nacharammal* (1908), 17 M. L. J., 622.

The rule of equity embodied in this section is not opposed to any principle of Muhummadan law and section 2 does not preclude its application in cases falling under the Muhummadan law. What constitutes good faith within the meaning of this section is a question of fact and a person may act in good faith, though he acts under a mistake of law. *Durgozi v. Fakeer* (1906), 30 Mad., 197.

A claim by a tenant for improvements does not come within the scope of this section, because a tenant could not possibly believe in good faith that he was absolutely entitled to the land. *Ismail v. Jai-gun* (1900), 27 Cal., 570, 586; *Nundo Kumar v. Bonomali* (1902), 29 Cal., 871; cf. *Ismail Kani v. Nazarali* (1903), 27 Mad., 211; *Jug-mohandas v. Pallonjee* (1896), 22 Bom., 1.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto

Good faith,
meaning of.

Not applied to
tenants.

Transfer of
property pend-
ing suit rela-
ting thereto.

under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Rule of *lis pendens* not based on notice.—The rule is expressed in the maxim *Pendente lite nihil innovatur*. This maxim is founded not upon the technical ground of constructive notice, but, on the broad principle that litigation would be interminable, if any of the parties to an action could create any rights in favour of a third person during the pendency of a suit. The rule appears to be founded on judicial necessity. As observed by Lord Cranworth in *Bellamy v. Sabine* (1857), 1 DeG. & J., 566, 578: “It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though, undoubtedly, the language of the courts often so describes its operation. It affects him, not because it amounts to notice, but because the law does not allow litigant parties to give, to others, pending the litigation rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit,—whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence.” See also the observations of the Privy Council in *Faiyaz v. Prag Narain* (1907), 34 I. A., 102; 29 All., 339, in which the above case was cited; cf. *Golabchand v. Dhondi* (1873), 11 Bom. H. C., 64; *Fraval v. Sangapalli* (1872), 7 Mad. H. C., 104; *Lakshmandas v. Dasrat* (1880), 6 Bom., 168.

During the active prosecution means the same thing as ‘while the suit is in full force without any intermission’ in Lord Bacon’s ordinance and implies a constant and vigorous prosecution, and not merely that something must be done to keep the suit alive and in activity. *Preston v. Tubbin* (1684), 1 Vern., 287; *Houlditch v. Wallace* (1838), 5 Cl. & F., 629, 664; *Kasim Shaw v. Unnodapersaud* (1863), 1 Hyde, 160, 168; cf. *Gourmoney v. Reid* (1851), 2 Tay. & Bell., 100; but see *Kinsman v. Kinsman* (1831), 1 R. & M., 617, 622; *Venkatesh Govind v. Maruti* (1887), 12 Bom., 217; see also *Hunter v. The Earl of Hopton* (1855), 4 Macq., 972, where though the suit had remained dormant for 18 years, Lord Westbury nevertheless remarked, “It has been

asleep since 1847, but it is still *lis pendens*." And in America the opinion has been expressed that if the court allows a suit to remain pending for any length of time, the judgment cannot be collaterally attacked by a *pendente lite* alienee on the ground of delay or negligence in prosecuting it. Bennett, 173. Be this as it may, the mere abatement of a suit will not operate as a suspension of *lis pendens* and certainly not, if it is revived within a reasonable time. *The Bishop of Winchester v. Paine* (1805), 11 Ves., 194, 200-1.

Termination of *lis pendens*.—To constitute *litis pendentia* as observed by Lord Lyndhurst, L. C., in *Kinsman v. Kinsman* (1831), 1 R. & M., 622, there must be *litis contestatio*; therefore, if the suit is ended by decree there is no longer any *lis pendens* to affect the land. Decrees are not of themselves notice to a purchaser. Sugden's Vendors and Purchasers, 760. *Venkatesh v. Maruti* (1887), 12 Bom., 217. *Ambadas v. Ramchandra*. Bom. P. J. (1889), p. 99; *Kasim v. Unnoda* (1863), 1 Hyde, 160. In a large proportion of suits, however, instituted for the administration of assets under which charges might eventually be established against land, no final decree properly speaking is ever made, but as soon as the immediate object of the parties is accomplished, they decline to prosecute the suits further. In such cases, the cause may be said to be absolutely determined, when the object has been achieved for which it was originally commenced. The rule that where the suit is ended by a decree, there can be no *lis pendens* to affect the land was treated in a Bombay case apparently as authority for the proposition that a mortgagor may transfer the mortgaged property after a decree for sale. *Venkatesh v. Maruti* (1887), 12 Bom., 217. But it has been held in a later case that the doctrine of *lis pendens* is applicable to proceedings to realize a mortgage after a decree for sale. *Shivjiram v. Waman* (1897), 22 Bom., 939; see also *Rachappa v. Manges*, Bom. P. J. (1898), p. 386; *Samal v. Babaji* (1904), 28 Bom., 361. But there are some expressions in the judgments which may be construed as requiring the existence of a pending proceeding to give rise to a *lis pendens*. This, however, could hardly have been intended, for the mortgagor cannot surely transfer the property to the prejudice of the mortgagee the moment a decree is pronounced in favour of the latter. *Thakur Prasad v. Gaya* (1898), 20 All., 349; *Harsankar v. Sheogobind* (1899), 26 Cal., 966; 4 C. W. N., 317. In *Chuni v. Abdul* (1901), 23 All., 331, it was held that a decree under section 88 of the Transfer of Property Act being only a decree *nisi*, the suit does not terminate until an order absolute is made under section 89. An opinion was also expressed that the *lis* would probably not be completed before the actual sale.

Lis pendens continues even after decree for sale in mortgage-suits.

It has since been decided that a mortgage-suit, even after a decree has been made and an order absolute for sale passed, is a pending suit until the sale actually takes place. *Bhagwan v. Nilkanta* (1904), 9 C. W. N., 171. So also it was held in *Surjiram v. Barhamdeo* (1905), 2 C. L. J., 288, that in the case of a mortgage-suit, the *lis* continues after the decree *nisi* and the doctrine is applicable to proceedings to realize the mortgage. See also *Bhawani v. Mathura* (1907), 7 C. L. J., 1; *Braja v. Joggeswar* (1908), 9 C. L. J., 346; *Mahadeo v. Thakur* (1910), 14 C. W. N., 677; *Madaneswar v. Mahamaya* (1911), 15 C. W. N., 672; cf. *Ravji v. Krishnaji* (1874), 11 Bom. H. C., 139; *Ganesh v. Chimnaji*, Bom. P. J. (1874), p. 189; *Sheik Eida v. Ramjug* (1873), 21 W. R., 14; *Kolluri Nagabhasanum v. Ammanna* (1880), 3 Mad., 71; *Birchand v. Mahomed* (1884), 10 Cal., 299; the head-note of which is misleading; cf. *Osborne v. Casey* (1845), 7 Ir. Eq. R., 636; *Bibijan v. Sachi* (1904), 31 Cal., 863. A suit for foreclosure of a mortgage is not terminated until the passing of the decree absolute. *Parsotam v. Chedda* (1906), 29 All., 76; 3 A. L. J., 675. This is also the law in America. Thus Mr. Bennett in his treatise on *Lis pendens*, p. 120, says, "Although it is true, in a general sense, that *lis pendens* ceases with the rendition of judgment or entry of final decree, yet, in the case of a foreclosure of a mortgage on real estate, it cannot be said that *lis pendens* ceases upon the making of the master's deed after sale under the decree. Where something remains to be done by the court, in the execution of its judgments and decrees, other than can be done without order of court, by the merely ministerial officers of the court, *lis pendens* continues until the decree is executed. So, in the case of the foreclosure of a mortgage, it continues until the purchaser has been put into possession of the property." And generally speaking the *lis pendens* is not terminated where the decree does not either technically or practically put an end to the suit, as for instance, a decree for account, *Higgins v. Shaw* (1842), 2 Dr. & War., 356; cf. *Gocool v. Administrator-General* (1880), 5 Cal., 720. Proceedings for the ascertainment of mesne profits are, it has been said, in continuation of the original suit. *Midnapur Zemindary v. Naresh* (1911), 16 C. W. N., 109. But it is difficult to see how there can be any question of *lis pendens* when the claim is only one for damages.

Appeal how far a continuation of the *lis*.—An appeal is regarded as a continuation of the *lis*, so that a person who purchases after the dismissal of an action will be treated as a purchaser *pendente lite*, if an appeal is afterwards brought against the decree. *Dino Nath v. Shama Bibee* (1900), 28 Cal., 23; 4 C. W. N., 740; *Sukhdeo v. Jamna* (1900), 23 All., 60; *Settappa v. Muthia*

(1908), 31 Mad., 268. And in one case where the property was sold by the defendant before the trial, it was held that the purchaser was bound by the judgment of the court of appeal, although the judgment of the original court was against the plaintiff and the purchaser was not a party to the proceedings in appeal. *Gobind Chunder v. Gooroo Churn* (1887), 15 Cal., 94. But this would seem to be pushing the doctrine to a point at which it ceases to be useful. See the judgment of Glover, J., in *Chunder Kumar v. Gope Kisto* (1873), 20 W. R., 204; from which D. N. Mitter, J., dissented, relying upon the dictum of Lord Redesdale in *Gore v. Stackpole* (1813), 1 Dow, 31; but see Sugden's Vendors and Purchasers, 758, where this dictum is criticised. The English law on the subject is thus stated in Fisher's Mortgage, p. 569:—"It may be observed, with respect to appeals from the court below, either to a superior jurisdiction there or to the House of Lords, that an order for an appeal seems not to be a continuation of the *lis pendens*, because, as a general rule, the appeal puts no stop to the proceedings under the decree. The *litis contestatio* is assumed to be at an end until the decree is varied or reversed, and the same practice prevails in the House of Lords, which seems to be a strong argument against the continuation of the *lis pendens* during the appeal; see also Coote's Mortgage, 1344. For the American law on the subject see the authorities, which are somewhat conflicting, cited in Hukum Chand's *Res Judicata*, pp. 700—4. In *Cheever v. Minton, &c.* (1889), 21 Pac. Rep., 710, a leading case on the point, it was held that a purchaser in good faith at a private sale, whose title rests on a voidable decree in chancery, the purchase being made after the entry of the decree and before a writ of error was sued out is not affected by a subsequent reversal of the decree. A final decree, where no appeal is taken is a final determination of the particular suit, and subsequent proceedings by a writ of error constitute a wholly new and independent action. Therefore the purchaser did not take *pendente lite*. *Quære*:—Whether the word 'suit' in sec. 372 of the Code of Civil Procedure, 1882 (now O. 22, r. 10), included an appeal? See *the Collector of Muzafarnagor v. Husaini* (1895), 18 All., 86; *In the matter, &c., of Durga* (1899), 22 All., 231.

English law in case of appeal.

American law.

Rehearing or Review.—In *Nazeer Ali v. Ojoodhya Ram* (1867), 8 W. R., 399, it was argued that a purchaser who had bought an estate in Midnapore after an absolute decree for foreclosure made by the late Supreme Court of Calcutta, could not be affected by the circumstance that the decree was afterwards reopened by reason of irregularity in the conduct of the party who had obtained it. The learned judges, after expressing a doubt, whether the court, within whose local jurisdiction the immovable property

sought to be recovered is situated, ought to hold itself bound by the decision of a foreign court as to the equities relative to that property between parties claiming it adversely to each other, held that a decree for foreclosure which only declares that as between plaintiff and defendant, the former is entitled to hold the property free from the equities of the latter, could not be insisted upon by a stranger, when it has been declared to have been inoperative *ab initio* between the parties. If it ought not to have been passed as against the mortgagor, how can any alienation, ask the learned judges, however innocent, even though made on the faith of it, be in a better condition in equity as regards the claims of the mortgagor, than if it had not been made. For the law in America on the subject, see Hukum Chand's *Res Judicata*, pp. 701—704.

Court having authority in British India, &c.—But a purchaser may be affected by notice of a decree of a foreign court, though it cannot directly operate on land in British India. *Palani v. Subrammonyan* (1896), 19 Mad., 257; cf. *Huntley v. Gaskell* (1905), 2 Ch., 656, 661. The court must be a court of competent jurisdiction: *Bissonath v. Radhakristo* (1869), 11 W. R., 554; see also *Anund Moyee v. Dhanendra* (1871), 14 M. I. A., 101; 8 B. L. R., 122; 16 W. R. (P. C.), 19, where their Lordships of the Privy Council point out that a decree for sale made by the Supreme Court in Calcutta of land in the mofussil could have no effect *in rem* so as to bind a purchaser *pendente lite*. But see *Wickliffe v. Breikenridge*, 1 Bush., 427, cited in Story's Equity Jurisprudence, s. 406. But the rule of *lis pendens* will operate in favour of a plaintiff who at the time of the transfer was erroneously prosecuting his suit in a court which from defect of jurisdiction was unable to entertain it and returned the plaint for presentation to the proper court, which court ultimately decreed the suit. *Tangor v. Jaladhar* (1909), 14 C. W. N., 322.

The rule of *lis pendens* is applicable to miscellaneous proceedings.

Contentious Proceeding.—The rule of *lis pendens* applies not only to suits technically so-called, but also to other proceedings, as, for instance, the presentation in court of an award; *Pranjivan v. Raju* (1879), 4 Bom., 34; *Sorabji v. Ishvardas*, Bom. P. J. (1892), p. 5; or bankruptcy proceedings which must at some stage or other become *lis pendens*, as the object of all such proceedings is to enable the court through its officers to distribute the bankrupt's assets among his creditors. Hukum Chand's *Res Judicata*, 685. In the case of a suit by a pauper the application for leave to sue *in forma pauperis* will be the commencement of contentious proceedings within the meaning of this section; *Ambika v. Dwarka* (1907), 30 All., 95.

Commencement of *lis pendens*.

Commencement of *lis pendens*.—It was thought at one time that *lis pendens* took effect only from the service of the summons,

as the suit became contentious for the first time at that stage. *Radhasham v. Shiva* (1888), 15 Cal., 647; *Pursotom v. Sawhi* (1899), 21 All., 408; *Abboy v. Annamalai* (1888), 12 Mad., 180; although in the case of several defendants the suit did not become contentious only when all the defendants were served with summonses. *Chaturbhuj v. Lachman* (1905), 28 All., 196; but see *Jogendra v. Fulkumari* (1899), 27 Cal., 77; 4 C. W. N., 254, in which it is pointed out that the proposition that a suit does not become contentious until service of summons is based upon a confusion due to an erroneous application of the English rule that, as between plaintiff and defendant, the service of the subpoena constitutes the *lis pendens* between them. The question has now been set at rest by the Privy Council in *Faiyaz v. Prag Narain* (1907), 34 I. A., 102; 29 All., 339, in which it was observed:—"Their Lordships are unable to agree in the view which seems to have obtained in India that a suit contentious in its origin and nature is not contentious within the meaning of section 52 of the Act of 1882 until a summons is served on the opposite party. There seems to be no warrant for that view in the Act, and it certainly would lead to very inconvenient results in a country where evasion of service is probably not unknown or a matter of any great difficulty." If however the service of the summons could not be effected on the defendant owing to inaction on the plaintiffs' part, it may be said that there was no active prosecution of the suit. *Krishnappa v. Shivappa* (1907), 31 Bom., 393.

In the view of Maclean, C. J., a suit must be treated as a contested suit from its very commencement, if it ultimately turns out to be a contested one. "It seems to me," says the Chief Justice, in *Jogendra v. Fulkumari*, *supra*, "that in order to appreciate whether the section applies, we must regard the event, and in this case the event showed a contested suit." In this view, an undefended suit can never be a contentious suit. See *Upendra v. Mohri* (1904), 31 Cal., 745. This, however, is not the sense in which the term 'contentious proceeding' is used in probate practice from which it seems to have been borrowed and where it merely means a proceeding in which there are adversary parties and which is the opposite of common form business. *Moran v. Plan* (1896), P. D., 214; *Salter v. Salter* (1896), P. D., 291. Cf. sec. 253A of the Indian Succession Act; *Annamalai v. Malayandi* (1905), 29 Mad., 426. See also *Mati v. Preo* (1908), 9 C. L. J., 96; 13 C. W. N., 226; *Krishna Kamini v. Dinomony* (1904), 31 Cal., 658. A suit therefore cannot be said to be non-contentious merely because it is undefended. And a suit for sale on a mortgage praying for relief against the mortgagor is from

Suit may be contentious before service of summons.

What is a contentious proceeding.

Application of
rule to *ex parte*
decrees.

the beginning a contentious suit within the meaning of this section, to which the doctrine of *lis pendens* would apply even if the suit were decreed *ex parte*. *Durga v. Madho* (1908), 8 C. L. J., 153. See also *Brojo v. Meajan* (1909), 13 C. W. N., 1138; *Ramdayal v. Ramtanoo* (1911), 15 C. L. J., 137. See also *Krishnappa v. Shivappa*, *supra*.

According to Banerjee, J., the expression "contentious suit" is used in contra-distinction to a friendly suit in which there is no contest, and the parties bring the suit only to obtain the decree of a court declaring their rights as to which they are themselves in perfect agreement. *Jogendra v. Fulkumari* (1899), 27 Cal., 77. There can however be no doubt that a suit of any sort whatever, except only collusive suits, is, from the moment it is filed, potentially contentious and that so-called 'friendly suits' are really contentious. *Krishnappa v. Shivappa* (1907), 31 Bom., at. p. 404.

Litis contestatio
in Roman Law.

It may be here noticed that in the Roman law from which the term *litis contestatio* so frequently used in the English law in this connection is derived, a contested right did not become the subject of litigation as soon as the plaintiff had taken the first step towards an action. It was only at the point when the litigants were remitted to a *judex*, the instant when the proceedings in *in jure* terminated and those in *judicio* commenced that the *litis contestatio* began. The meaning of the term is thus given by Festus. "Contestari est cum uterque reus dicit Testes estote. Contestari litem dicuntur duo aut plures adversarii, quod ordinato iudicio utraque pars dicere solet, Testes estote;" where he is evidently referring to the time anterior to the introduction of the formulary process when *legis actiones* were in use. This ceremony became in later times a mere form, but the name was still retained. Ulpian says: "proinde non originem iudicii spectandam, sed ipsam iudicati velut obligationem," referring to the obligation of a *reus* after award. D. 15, 1, 3, 11; Abdy & Walker, p. 251. As to the law in England on the subject, see Sugden, 758; Coote's Mortgage, 1344; Fisher, p. 570; see also 2 White & Tudor, 244, where it is said that *lis pendens* will now take effect from the service of the writ in an action which is the commencement of proceedings under R. S. C., 1883, Order 2, r. 1. In America also the law is the same. Jones, s. 1411; cf. *Hukum Chand's Res Judicata*, p. 695. But it has been held in one or two cases that filing a bill without subpoena is *lis pendens*. *Leitch v. Wells*, 48 N. Y., 585, cited in Story's Equity Jurisprudence, s. 405. See also *Drew v. Norbury* (1846), 9 Ir. Eq., 171, 176. It has been held in America that while a *lis pendens* as against one taking under the defendant dates from the commencement of the action, a cross-bill seeking affirmative relief creates a *lis*, as to one

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America.

taking under the plaintiff, only from the moment of the filing of the cross-bill. In this case during proceedings to foreclose a mortgage the intervening plaintiff purchased the property at an execution-sale for value and without actual notice. Subsequently the mortgagor filed a cross-bill to have the mortgage cancelled, claiming a *lis pendens* from the beginning of the foreclosure proceedings. *Bridger v. Exchange Bank* (1906), 56 S. E. Rep., 97 (Ga.)

Right to immovable property directly and specifically in question.—In order to make the doctrine applicable the description of the property must be so definite that any one can learn what property is intended to be the subject-matter of litigation. *Lokenath v. Achitananda* (1909), 15 C. L. J., 391. The question in dispute must relate to an interest in land, and not merely to money secured upon it; *Worsley v. Ld. Scarborough* (1746), 3 Atk., 392. See however *Norris v. Stuart* (1852), 16 Beav., 359; cf. *Jennings v. Bond* (1845), 2 Jo. & Lat., 720; *Crofts v. Oldfield* (1676), 3 Sw., 278, note; *Houlditch v. Wallace* (1838), 5 Cl. & F., 629; 1 Dr. & War., 490; *Manika v. Ellappa* (1896), 19 Mad., 271; disting. *Baldeo v. Baijnath* (1891), 13 All., 371. The case of *Upendra v. Mohori* (1904), 31 Cal., 745, in which it is said that a suit for recovery of money due on a mortgage by sale of the mortgaged properties is not one in which right to immovable property is in question is not law. See the cases cited at p. 698, *ante*. Where however in a suit purporting to be brought on a mortgage, only a money-decree was made, so long as that decree remained unreversed, the suit could not be regarded as one in which a right to immovable property was “directly and specifically in question” within the meaning of this section. *Chatterput v. Maharaj* (1904), 32 I. A., 1; 32 Cal., 198. So, the mere pendency of a suit for maintenance in which the plaintiff does not claim to charge any specific property, though it may result in a decree charging a part of the estate with plaintiff’s maintenance, will not affect a purchaser *pendente lite*. *Manika v. Ellappa* (1896), 19 Mad., 271. In *Brightman v. Brightman*, 1 R. J., 112, the Rhode Island Supreme Court said: “The prayer of complainant’s petition was for divorce and for alimony out of her husband’s estate. It did not affect the title to his real estate, or necessarily seek to put any incumbrance on it. Alimony is to be granted out of the personal or real estate, and is not necessarily a charge on either. Had the prayer in this case been for alimony to be assigned her out of this particular farm, the case would somewhat resemble some of the cases in books, where the rule has been applied. But it is not so; it is general for alimony out of his estate. If such a prayer locks up the real, it equally does the personal estate of a respondent to such a petition, and each and every part of it.”

"The instant such a petition is filed, the respondent's business, however extensive it may be, must stop; purchasers and dealers with him by the policy of the law, are bound by the decree of alimony that may be passed; although they do not even know that they are dealing with a married man. Alimony will be claimed and must be allowed to attach to any and every part of the personal property that the husband had at the filing of the petition. We do not think the case falls within the rule of *lis pendens*, nor within the reason of that rule." In another case the court even went further, and the rule was held not to apply even though the suit was for a divorce and for an equal undivided one-third of the real property then owned by the husband. Lord, J., in delivering the judgment of the Oregon Supreme Court said: "The divorce-suit of the plaintiff was not brought specifically to recover the one-third of the real estate of her husband, as was decreed in the divorce-proceeding. The land was not the subject-matter of the litigation, and the subject of the suit was not to recover title that belonged to the plaintiff. It was incidental and collateral to the divorce-proceeding. The court has no jurisdiction to affect the title of the husband to his lands, or decree that one-third of them shall be set apart for her in her own right and title, independent of a decree for divorce. Nor has the plaintiff any title on which to base a suit to recover any portion of the same, except as it comes by force of the Statute upon a decree for divorce." *Houston v. Timmerman*, 11 Am. St. Rep., 848; cited in *Hukum Chand's Res Judicata*, p. 725. Cf. *Wigney v. Wigney* (1882), 7 P. D., 228. But a suit in which a widow claims to get her maintenance made a charge on immovable property is one in which a right to such immovable property is directly and specifically in question, and any transfer during the pendency of the suit not effected for the purpose of paying off any debt entitled to priority over the claim for maintenance will be affected by *lis pendens*: *Dose v. Krishna* (1906), 29 Mad., 508; *disting. Self v. Madox* (1687), 1 Vern., 458.

Suit for divorce and a share of real property.

Claim for maintenance.

Petition to wind up company.

Administration action by creditor.

A petition to wind up a company does not constitute a *lis pendens* as against a contributory, where there is no claim to specific property or to a charge upon specific property of the individual contributory. *In re Barned's B. Co.* (1867), L. R., 2 Ch., 171. The question how far a creditor's action for general administration may be a sufficient *lis pendens* was discussed by Kay, J., in *Price v. Price* (1887), 35 Ch. D., 297, and many of the cases bearing on the point are reviewed in the judgment. The result of the authorities may be thus summed up. Where debts are charged upon immovable property by a testator, an administration-suit by a creditor will operate as a *lis pendens*. *Walker v. Smalwood* (1768), Amb., 676; *Moore v.*

McNamara (1812), 2 Ba. & Be., 186; *Higgins v. Shaw* (1842), 2 Dr. & War., 356; *Jennings v. Bond* (1845), 2 J. & Lat., 720; *Drew v. Earl of Norbury* (1846), 3 J. & Lat., 267, 282. But not so, where the debts are not charged on land, unless the plaintiff has indicated an intention to make the specifically devised land liable. But the purchaser will be protected, where he has a right to suppose that the defendant is transferring the property to pay the debts of the testator. *Walker v. Flamstead*, 2 Keny., Pt. 2, p. 57; *Price v. Price*, supra; cf. *Edgar v. Plomley* (1900), A. C., 431, 440. The operation of a creditor's action as *lis pendens* was considered by the Judicial Committee in *Buzayel v. Dooli Chand* (1878), 4 Cal., 402, where it was held that, although the creditors of a deceased Mahomedan cannot ordinarily follow his estate in the hands of a *bonâ fide* purchaser for value to whom it has been alienated by the heir-at-law, yet that a decree directing the latter to account for the same made at the instance of a creditor in order that the assets might be applied for the purpose of discharging the debts due from the deceased ancestor was a decree against the estate and operated to bind it in the hands of the heir, and therefore of any subsequent transferee. Cf. *Yasin v. Unhammedyar Khan* (1897), 19 All., 504. And generally when the estate of a deceased person is under administration by the court or out of court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the estate of the deceased in due course of administration, the right of the residuary legatee or heir being only to share in the residue after all the liabilities of the estate have been satisfied. *Chatterput v. Maharaj* (1904), 32 I. A., 1; 32 Cal., 198.

Creditor's
action when
operates as *lis
pendens*.

It has been said that a suit for partition in which the rights of the parties are not in any way in controversy does not constitute a *lis pendens* because no right to immovable property is directly and specifically in question, and the words of the section, if literally construed, would seem to support this view. *Shaik Khan Ali v. Pestonji* (1894), 1 C. W. N., 62. See, however, the remarks on this case in *Jogendra v. Fulkumari* (1899), 27 Cal., 77; 4 C. W. N., 254. And on principle there can be no doubt that a purchaser *pendente lite* would be bound by a partition made by the court; see *Settappa v. Muthia* (1908), 31 Mad., 268; and it has been so decided in America. *Howes v. Orr*, 10 Bush, 437, cited in *Hukum Chand's Res Judicata*, p. 723. But where the plaintiff in a suit for partition admitted that a certain person, who was made a defendant had a share, but the co-defendants put in written statements denying that the other defendant had any share, it was held that the suit did not become contentious until the written statement was put in, disputing

Suit for parti-
tion.

As between
co-defendants.

the right of the other defendant in the property under partition. *Krishna Kamini v. Dinomony* (1904), 31 Cal., 658.

Lis pendens, it has been also said, can only be relied on as a protection of the plaintiff's right to property which is actually the subject-matter of litigation; *Brahannoyaki v. Krishna* (1885), 9 Mad., 92. But this proposition seems to be too wide as the words "any right to immovable property directly and specifically in question" may include cases in which the land itself is not sought to be recovered. Thus it has been held in England that a suit to establish a will, will constitute a *lis pendens* affecting a purchaser either from the heir or the devisee. *Garth v. Ward* (1741), 2 Atk., 174; cf. *Diqambari v. Eshan* (1871), 15 W. R., 372. It has, however, been held in America that the purchaser of land pending a suit in trespass between his vendor and a third person in which the title is directly and specifically in issue does not take subject to the judgment which may be subsequently pronounced. *Hailey v. And*, 32 Am. St. Rep., 764. The rule applies to a suit for pre-emption and the sale by the vendee of the property after institution of the suit does not affect the right of the plaintiff. *Ghasitey v. Gobind* (1908), 30 All., 467; 5 A. L. J., 477. The doctrine applies to a suit for specific performance of a contract. *Mati v. Preo* (1908), 9 C. L. J. 96; 13 C. W. N., 226; cf. *Baxter v. Middleton* (1898), 1 Ch., 313.

Suit for pre-emption; and specific performance.

Property cannot be transferred or otherwise dealt with.—

Yearly leases in the ordinary course of management are not within the rule. *Radhika v. Radhamoni* (1883), 7 Mad., 96; disting. *Kenney v. Jessop* (1845), 7 Ir. Eq., 494. A purchaser, who acquires by his purchase a paramount title, for instance, at a sale for arrears of revenue, would not also be affected by the rule of *lis pendens*, *Kondi v. Dukshanamurtie* (1882), 5 Mad., 371; nor as Westropp, C. J., points out in *Rambhat v. Lakshman* (1881), 5 Bom., 630, can an adoption *pendente lite* be regarded as in the same predicament as an alienation *pendente lite*. Disting. *Umamoye v. Tarini* (1867), 7 W. R., 225. A sale for arrears of revenue of a share of an estate stands upon a different footing, but it has been said that it cannot be regarded as an alienation made by the proprietor under this section, *Mahadeo v. Thakur* (1910), 14 C. W. N., 677. See also *Mahomed v. Hem* (1909), 10 C. L. J., 590. Again a right acquired before the commencement of the suit will not be affected by *lis pendens* though it is perfected and paid for while the suit is pending. Thus, a person who has contracted to buy property will be protected, though it is conveyed to him after the commencement of a suit in which the title of his vendor is litigated. Bennett, 277; See also *Parks v. Smart's Administrators*, 105 Ky., 63; 48 S. W., 146. So also

Purchaser not affected where the contract to buy was prior to the suit.

a mortgagee may buy at his own sale pending a suit to establish a mechanic's lien. *Andrews v. National, etc., Works*, 77 Fed., 774. Similarly where the plaintiff gave notes to *A*, to collect and invest the proceeds in land in the plaintiff's name, but *A* took the deeds in his own name and executed a mortgage to secure future advances to the defendants who had no knowledge of the plaintiff's right, and the plaintiff afterwards sued *A* for accounts and asserted a lien on the land and during the suit the defendants advanced money to *A*, without knowledge either of the plaintiff's right or of the suit, the defendant's mortgage for all sums advanced was allowed priority over the plaintiff's lien. *Straeffer v. Rodman*, 141 S. W., 742 (Ky.) In *Har Pershad v. Dalwardan* (1905), 32 Cal., 891; 1 C. L. J., 371; it was observed that a mortgagee purchasing the property under a decree for sale on his own mortgage purchases it in the same condition in which it was at the date of the mortgage and the title by such purchase dated back. Such a purchaser is not therefore affected by the rule of *lis pendens* as regards his purchase if the suit has been brought after the mortgage. It was further observed that the doctrine of *lis pendens* might have application to such sales if the equity of redemption of the mortgagor was capable of being separately dealt with by a mortgagee under a decree for sale on the mortgage. The case however was actually decided on other grounds. Disting. *Norris v. Lord Dudley Stuart* (1852), 16 Beav., 359; cf. *Bapuji v. Icharam*, Bom. P. J. (1877), p. 81; *Lachmin v. Koteswar* (1880), 2 All., 826. So where a mortgage was created during the pendency of a mortgage-suit for the purpose of paying off other mortgages made prior to the suit, such transaction was held not to be affected by *lis pendens*. *Tara Prosad v. Kristo* (1910), 15 C. W. N., 261; 13 C. L. J., 13. But the mere fact that a person purchases under an attachment which was prior to the suit will not protect him from the operation of the rule of *lis pendens*. *Motilal v. Karrabuldin* (1897), 24 I. A., 170; 25 Cal., 179; *Mahadeo v. Thakur* (1910), 14 C. W. N., 677; *Parvati v. Kissen Sing* (1882), 6 Bom., 567; *Kuttadi v. Pilasheri* (1891), 1 M. L. J., 476; *Kenihumrah v. Amed* (1891), 14 Mad., 491; *Byramji v. Chunilal* (1902), 27 Bom., 266; cf. *Fruval v. Sangapalli Lachmideramma* (1872), 7 Mad. H. C. R., 104. Disting. *Anundo Moyee v. Dhonendra* (1871), 14 M. I. A., 101; 8 B. L. R., 122; 16 W. R. (P.C.), 19. It is sometimes said that *lis pendens* cannot have the effect of postponing a registered instrument, and the dictum of Sir William Grant in *Wyatt v. Barneel* (1815), 19 Ves., 435, is generally cited for the purpose. See also *Wallace v. Donegal* (1837), 1 Dr. & War., 461, 488; cf. Jones, s. 599. The proposition, however, can only be true if *lis pendens* operates merely by way of notice, but this has now ceased to be

recognised as the true basis of the rule. *Bellamy v. Sabine* (1857), 1 DeG. & J., 566; see also *Sam v. Appundi* (1870), 6 Mad. H. C., 752. An alienation therefore by a registered instrument *pendente lite* will not confer priority. *Lakshman v. Dasrat* (1880), 6 Bom., 168, and cases cited therein; *Gulabchand v. Dhondi* (1873), 11 Bom. H. C., 64; *Balaji v. Kushalji* (1874), ib., 24; *Puluck Dharee v. Mahabeer* (1875), 23 W. R., 382; *Bhagwan v. Nathu* (1884), 6 All., 444. Cf. *Krishnappa v. Bahiru* (1871), 8 Bom. H. C., o.c.j., 55, where a puisne mortgagee obtained possession pending a suit by a prior incumbrancer; *disting. Bapuji v. Icharam*, *supra*, where a purchase effected before the institution of the suit was registered *pendente lite*. It seems, however, that if the plaintiff in the action has only a defeasible estate, the defendant is at liberty to put an end to it and thus defeat the plaintiff's right. Sugden's Vendors and Purchasers, 759; cf. *Ward v. Tyrrell* (1858), 25 Beav., 563. See also *Blackwood v. London Chartered Bank of Australia* (1874), L. R., 5 P. C., 92, where it was held that a person who has *bonâ fide* paid money without notice of any other title, may afterwards, even *pendente lite*, get a legal title if he can. But the *tabula in naufragio* doctrine has never been recognised by our courts.

By any party to the suit or proceeding.—The doctrine applies to all alienations during the pendency of a suit, whether immediate by a party to the suit, or mediate by persons purchasing from those claiming under parties to the suit. *Robertson v. Cox* (1824), 2 L. J., Ch., 41; *Kasim v. Unnoda* (1863), 2 Hyde, 160. It has been held in Calcutta that a purchaser from a person in his own right would be bound by a decree against his vendor in a representative character. See *Deno Nath v. Shama Bibee* (1900), 28 Cal., 23; 4 C. W. N., 740; but this is very questionable law.

Consent-decree.

What orders will bind a purchaser.—There are conflicting decisions on the question whether a purchaser *pendente lite* would be bound by a consent-decree to which he was no party. *Naduroonnessa v. Aghur Ali* (1867), 7 W. R., 103; *Raj Kissen v. Radha Madhub* (1874), 21 W. R., 349; *Monohur v. Hurryhur* (1880), 3 Shome, 213; *Vythinadayyan v. Subramanya* (1889), 12 Mad., 439. The first three cases seem to favour the contention that a purchaser *pendente lite* would be bound by a consent-decree, while a contrary view is taken in the last case. Two of the Calcutta cases, however, can hardly be regarded as authority as the point does not seem to have been argued. In *Kishori v. Mohamed* (1890), 18 Cal., 188, the learned judges say that if the matter had been untouched by authority, they would have been inclined to answer the question in the negative. In the most recent case on the question, *Annamalai v. Malayandi* (1905), 29 Mad., 426, a full bench of the Madras High Court held

overruling *Vythinadayyan v. Subramania*, supra, that the doctrine of *lis pendens* applies to transfers effected during the pendency of a contentious suit or proceeding, even when subsequently a decree is passed in pursuance of a compromise, provided such compromise is not tainted by fraud or collusion. See also *Mati v. Preo* (1908), 9 C. L. J., 96; 13 C. W. N., 226; *Tangor v. Jaladhar* (1909), 14 C. W. N., 322. Cf. *Jenkins v. Robertson* (1867), L. R., 1 H. L., Sc., 117; *disting. Wyndham v. Wyndham* (1667), 3 Ch. Rep., 22; 2 Freem., 127. An alienee *pendente lite* will not be allowed to prove even an obvious error in the proceedings. *Hukum Singh v. Zukelal* (1884), 6 All., 506. But he will not be bound by any order whatever that may be made in the suit, but only by proceedings which from the nature of the claim and the relief prayed for, he might expect would take place. *Kalidas v. Foolchand* (1871), 8 B. L. R., 474; *Kasumunnissa v. Nilrutun* (1881), 8 Cal., 79; 9 C. L. R., 173, 10 C. L. R., 113; *Kishory v. Mahomed* (1890), 18 Cal., 188. *Denonath v. Shama* (1900), 28 Cal., 23; 4 C. W. N., 740. It is, however, permissible to doubt whether the rule was correctly applied in the last named case.

Purchaser is bound only by proceeding which might be expected to take place.

In a case in America, where the plaintiff brought a bill to recover land on the ground of fraud and set out the facts on which he relied, but, later, an amendment was allowed setting out additional facts to show fraud, on which additional facts the plaintiff obtained a decree, a purchaser from the defendant between the filing of the bill and its amendment was held bound by the decree. The purchaser had notice of the original bill and was satisfied that the facts stated did not constitute fraud but the court held that the amendment did not change the subject-matter of the suit. *Turner v. Honpt* (1895), 33 Atl. Rep., 28 (N. J.) But where the claim to relief failed on the ground originally put forward, and the plaint was then amended to show another equity upon which the plaintiff succeeded, a purchaser whose purchase preceded the amendment would not be bound by the decree. *Worthon v. Boyd*, 66 Tex., 401, cited in *Hukum Chand*, p. 696. Cf. *Price v. Price* (1887), 35 Ch. D., 297, 306. A fortiori, the *lis pendens* created by the inclusion of property not previously in litigation will not relate back to the commencement of the action so as to affect intervening rights. *Bennett on Lis Pendens*, p. 97.

Amendment of pleadings when operates as *lis pendens*.

Again, the purchaser will not be affected by equities merely because they may possibly arise out of the matter in question in the suit, if they do not appear on the pleadings. *Shallcross v. Dixon* (1838), 7 L. J. Ch., 180; *Bull v. Hutchins* (1863), 9 Jur. N. S., 954; cf. *Jennings v. Bond* (1845), 2 J. & L., 720. And he will not certainly be bound by the equities of a co-defendant to which it is not necessary to give effect for the purposes of the suit, though he will take subject to the interests

of the defendants *inter se* which naturally arise out of the rights of the plaintiff. *Bellamy v. Sabine* (1857), 1 DeG. & J., 566. Lord Bacon's ordinance upon the subject is no doubt expressed in very general language. "No decree bindeth any that cometh in *bonâ fide*, by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor order; but where he comes in *pendente lite* and while the suit is in full prosecution, and without any colour of allowance or privity of the court, there regularly the decree bindeth." But the order has generally been understood to mean that the decree binds only so far as the title of the plaintiff is concerned, as the context shows that it was only the title of the plaintiff which was contemplated by it. *Bellamy v. Sabine*, *supra*, should be distinguished from *Tyler v. Thomas* (1858), 25 Beav., 47, where the court had actually determined the matters in controversy between the defendants in favour of one defendant as against his co-defendant before the property was transferred by the latter. Lord St. Leonards, however, thinks that the judgment in the latter case cannot be reconciled with the decision in the former case. Sugden's Vendors and Purchasers, p. 760; but see Dart, p. 893. It should be here noticed that when the plaintiff does not himself claim any interest in the property as in an interpleader-suit the pendency of the suit will protect the interests of the defendants *inter se*. Dart, p. 893; cf. *Ramchandra v. Balvantrao*, Bom. P. J. (1883), p. 338.

Doctrine applicable to sales in invitum.—It will be observed that the section in terms deals only with voluntary alienations; cf. sec. 2, cl. (d); but it must not be supposed that the principle of *lis pendens* is confined only to such alienations. It is true that there is a conflict of opinion on the point; but the weight of authority is decidedly in favour of the extension of the doctrine to alienations *in invitum*. In the undermentioned cases the doctrine of *lis pendens* was confined only to voluntary alienations. *Gourmoney v. Reid* (1851), 2 Tay. & Bell, 83; *Ali Shah v. Husain Baksh* (1878), 1 All., 588; *Nuffer Merdha v. Ram Lall Adhichary* (1871), 15 W. R., 308; *Lalu Mulji Thakur v. Kushibai* (1886), 10 Bom., 400; *Chunder Nath v. Nilu Kan* (1882), 8 Cal., 690; *Hurruck Chand v. Mohamed Hossain*, S. D., N.-W. P. (1835), p. 372. The following are cases favouring the extension of the doctrine to sales *in invitum*. *Indurjeet Kooer v. Pootee Begum* (1873), 19 W. R., 197; *Raj Kishen v. Radha Madhab* (1874), 21 W. R., 349; *Kali Prosad v. Buli* (1878), 3 C. L. R., 396; 4 Cal., 789; *Jhuroo v. Raj Chunder* (1885), 12 Cal., 299; *Parvati v. Kisan* (1882), 6 Bom., 567; *Kunhi Umah v. Ahmed* (1891), 14 Mad., 491; *Fruval v. Sangapalli* (1872), 7 Mad. H. C. R., 104; *Rabia v. Wise* (1874), 23 W. R., 329; *Gobind v. Goorop Charan* (1887), 15 Cal., 94. In the case

of *Nilkant v. Suresh* (1885), 12 I. A., 17; 12 Cal., 414, their Lordships of the Privy Council expressed strong doubts as to the correctness of confining the principle to voluntary alienations. And the question may now be taken to be practically concluded by their Lordships' judgment in *Radhamadhab v. Monohur* (1888), 15 I. A., 97; 15 Cal., 756; see also *Moti v. Karrubuldin* (1897), 24 I. A., 170; 25 Cal., 179. Cf. *Harshankar v. Sheegovind* (1899), 26 Cal., 966; *Denonath v. Shama* (1900), 28 Cal., 23; 4 C. W. N., 740; *Sukhdeo v. Jamna* (1900), 23 All., 60; *Kadir v. Muthukrishna* (1902), 26 Mad., 230; *Byramji v. Chunilal* (1902), 27 Bom., 266; 5 Bom. L. R., 21; *Samal v. Babaji* (1904), 28 Bom., 361; *Raj Kishore v. Jadu* (1905), 11 C. W. N., 828; *Mati v. Preo* (1908), 9 C. L. J., 96; 13 C. W. N., 226; *Mahadeo v. Thakur* (1910), 14 C. W. N. 677. But a distinction has been taken in America between an ordinary sale by the court and the transfer by reason of a person's insolvency of his whole estate. *Sidgwick v. Cleveland*, 7 Paige, 290. "In the case of the defendants," says Mr. Chancellor Walworth, "whose interest in the subject-matter of the litigation becomes vested in others *pendente lite*, without an actual abatement of the suit, a distinction is very properly made between the transfer of that interest by the mere voluntary act of the defendant as in the case of a sale or assignment in the ordinary course of business, and a transfer of that interest by operation of law, as upon an assignment in bankruptcy or under our insolvent acts. In the first case, the complainant is not bound to make the assignee a party, although he may do so if he deems it essential to the relief, to which he may be entitled against such assignee. But in the last case the assignee, who has become such by operation of law, has a right to be heard, and must be made a party before the suit can be further proceeded in. The reason of the distinction is obvious. In the first case, the assignee, who is a mere voluntary purchaser, *pendente lite*, cannot defeat the complainant's rights, or delay his proceedings, by such purchase; for if he could do so, the litigation, by successive assignments, might be rendered interminable. He, therefore, has no right to be heard, unless he brings himself before the court by a supplemental bill, in the nature of a cross-bill, which he may sometimes do to protect his rights as such assignee; and the decree in the original suit, to which such assignee was not a party, will bind the assigned property in his hands. Neither can the defendant, who has made such voluntary assignment subsequent to the commencement of the suit, urge that as a reason why the suit should not proceed against him in the same manner, as if no such transfer had been made. In the other case, the assignee, upon whom the interest of the defendant has been cast by operation of law for the benefit of others, has a right to be heard for the protection of that interest. And the whole

Assignee in
insolvency
whether affect-
ed by *lis*
pendens.

legal and equitable interest therein, which formerly belonged to the defendant, being vested in such assignee by the mere operation of the law itself, he will not be legally or equitably bound by a decree, to which he is not a party. *Deas v. Thorne*, 3 John. Rep. 544. It has also been held in England that the rule of *lis pendens* does not apply to an assignee in insolvency of the mortgagor, though the proceedings would be effectual against a purchaser claiming under a conveyance by the mortgagor; *Wood v. Surr* (1854), 19 Beav., 551; cf. *Wood v. Surr* (1859), 2 W. R. (Eng.), 683. See also *Punithavelu v. Bhashyam* (1901), 25 Mad., 406, where it was held that the rule does not apply to the official assignee in whom the debtor's property is vested under the Indian Insolvent Debtor's Act.

Knowledge by the opposite party of transfer immaterial.

—In *Landon v. Morris* (1832), 5 Sim., 247, the court observed that it would be a direct innovation of the doctrine, and quite unwarranted either by the principle on which it rests, or by anything to be found in the cases which have been decided upon it, to allow a purchaser to escape from the effects of the suit, by showing that his purchase became known to the party suing the vendor, and that this party afterwards went on without calling upon him, or letting him in to defend the suit. Cf. *Kunhi v. Amed* (1891), 14 Mad., 491; *Kaliprosad v. Buli* (1878), 4 Cal., 789.

Transfer not void but inoperative against parties to suit.

So as to affect the rights of any other party, &c.—The effect of the rule is not to annul the conveyance but only to render it subservient to the rights of the parties in the litigation, in dealing with which the conveyance is treated as if it never had any existence. *Bishop of Winchester v. Paine* (1805), 11 Ves., 194; *Metcalfe v. Pulvertoft* (1813), 2 V. & B., 200; cf. *Umes v. Zahur* (1889), 17 I. A., 201; 18 Cal., 164; *Ishaq v. Chuni* (1898), 21 All., 149. As the effect of the doctrine is not to annul the conveyance made in contravention of it, but only to render it subservient to the rights of the parties to the litigation, it is not applied so as to affect the title of the alienee of a defendant by virtue of a claim not interfering with the title of the plaintiff in the pending litigation. *Nathaji v. Nana* (1907), 9 Bom. L. R., 1173. In other words, the purchaser is treated as standing in the place of the person from whom he has taken the assignment. *Madho v. Ramji* (1894), 16 All., 286; *Sheo Narain v. Chunni* (1900), 22 All., 243; *Ramchandra v. Mahadaji* (1884), 9 Bom., 141; cf. *Ishan v. Beni* (1896), 24 Cal., 62, decided under sec. 244 of the Code of Civil Procedure, 1882. But an assignee *pendente lite* may be added as a party, at any rate where he does not object. Section 372 of the Code of Civil Procedure, 1882; see O. 22, r. 10, of the present Code; cf. O. 17, r. 3, R. S. C., and see *Kino v. Rudkin* (1877), 6 Ch. D.,

160. For cases under the former practice, see *Solomon v. Solomon* (1843), 13 Sim., 516; *Johnson v. Thomas* (1849), 11 Beav., 501. See also *Commercial Bank v. Sabju* (1900), 24 Mad., 252. But where the assignee has been added and the plaint amended so as to raise fresh questions as between the plaintiff and the added defendant the doctrine of *lis pendens* does not apply. *Manpal v. Sahib* (1905), 27 All., 544. In England, the doctrine of *lis pendens* may not always be a sufficient protection, for where a legal interest with which it is necessary to deal by the decree passes to the assignee, he cannot be compelled to reconvey it, unless he is added as a party. *Bishop of Winchester v. Paine* (1805), 11 Ves., 194, 199; *London, &c., Company v. Lewis* (1882), 21 Ch. D., 491; and see the remarks of their Lordships of the Privy Council in *Anwarul Moyee v. Dhondro* (1871), 14 M. I. A., 101; 8 B. L. R., 122; 16 W. R. (P. C.) 19; cf. *Gourmoney v. Reed* (1851), 2 Taylor & Bell, 83, 100; *Kasim v. Unnodapersaud* (1863), 1 Hyde, 160, 169. An injunction may, therefore, be granted restraining the defendant from transferring the property until the hearing of the suit. *Beyfus v. Bullock* (1869), L. R., 7 Eq., 391; *London Banking Co. v. Lewis* (1882), 21 Ch. D., 490; *Spiller v. Spiller* (1819), 3 Swanst., 556; *Hadley v. The London Bank, &c.* (1865), 3 DeG. J. & S., 63; but see *Turner v. Wight* (1841), 4 Beav., 40. The doctrine does not defeat a purchaser under a decree or order for sale, when the *lis pendens* is the *very suit* in which that decree or order is passed. *Shivlal v. Shambhu* (1905), 29 Bom., 435; 7 Bom. L. R., 585. A contrary view, however, was taken by Phear and Ainslie, JJ., in *Indurjeet Koer v. Pootee* (1873), 19 W. R., 197; and the question is not altogether free from doubt.

***Lis pendens* not an incumbrance.**—A *lis pendens* does not create a charge or lien on the property, nor does it excuse a purchaser from completing his contract, but merely puts him upon an inquiry into the validity of the claim against his vendor. *Bull v. Hutchins* (1863), 32 Beav., 615.

Lis pendens
puts purchaser
upon enquiry.

Rule of *lis pendens* to be applied with caution.—The principle of *lis pendens* must be applied with great caution in this country because there is much danger of secret collusion. See the observations of their Lordships of the Privy Council in *Tarakant v. Puddomoney* (1866), 10 M. I. A., 476. Again there is no law in this country compelling the registration of a *lis pendens* though a suit for land may be instituted in *any* court within the jurisdiction of which *any* portion of the property is situated. "That rule," said the learned judges of the late Supreme Court of Calcutta, speaking of the doctrine of *lis pendens*, "has been modified lately by Statute Law in England, and

Rule to be
applied with
caution in
India.

is now applied only where the *lis pendens* is registered. The doctrine was originally introduced on grounds of policy for suppression of frauds from collusive alienations to defeat the objects of suits. It has no foundation in natural equity, and though probably it has in the main been productive of more good than evil, there is no such merit in the doctrine itself as to recommend it now to the adoption of courts not bound by law to follow it." *McArthur v. Kelsall* (1850), 1 Taylor & Bell, 148, 167.

Rule not applicable to movable property.

Doctrine confined to immovable property.—It has been recently held in England that the doctrine of *lis pendens* is not applicable to movable property; Lord Justice Davey observing that a contrary decision would not 'stand with the reason of mankind.' *Wigram v. Buckley* (1894), 3 Ch., 483, 497; cf. *Punithavelu v. Bhashyam* (1901), 25 Mad., 406. It may, however, be noticed that in America the doctrine is well established that, with the exception of negotiable papers, *lis pendens* applies to personal property as well as to real estate. Bennett, 198.

Fraudulent transfer.

53. Every transfer of immovable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

Where the effect of any transfer of immovable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

CHAPTER III.

OF SALES OF IMMOVABLE PROPERTY.

"Sale" defined.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

Sale how made.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

Contract for sale.

It does not, of itself, create any interest in or charge on such property.

As to limitation to the territorial operation of paragraphs 2 and 3 of s. 54, see s. 1, *supra*. These paragraphs extend to every cantonment in British India—see Act XV of 1900, s. 29 (1).

For the meaning of the words "a reversion or other intangible thing," see *Subramanian v. Perumal* (1895), 18 Mad., 454, in which case the distinction is said to lie between vested and contingent interests; but this is not quite accurate, for a vested remainder is as intangible as a contingent remainder. The term would certainly include incorporeal hereditaments, as they are called in the English law. The right of a simple mortgagee in the property mortgaged would also seem to be only an intangible thing like a charge on immovable property. *Ramasami v. Chinnan* (1901), 24 Mad., 449. See also *Debendra v. Mirza* (1909), 10 C. L. J., 150, 173. An opinion seems to have been expressed in a Calcutta case that an equity of redemption, as it is called, in other words, property in mortgage, is not tangible property. *Fatik v. Rajendra* (1900), 4 C. W. N., cxlii. But the report is, perhaps, inaccurate; for though the equity of redemption in an usufructuary mortgage may be an "intangible thing" within the meaning of this section, the equity of redemption in a simple mortgage is undoubtedly tangible immovable property.

Meaning of the words "other intangible thing."

Rights and
liabilities
of buyer and
seller.

55. In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

(1) The seller is bound—

- (a) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;
- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;
- (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;
- (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;
- (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents ;
- (f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;

- (g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same :

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power :

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (b), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request,

to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require ; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

- (a) to the rents and profits of the property till the ownership thereof pass to the buyer ;
- (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.

(5) The buyer is bound—

- (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest ;
- (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs : Provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto ;

- (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller ;
 - (d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold and the interest thereon afterwards accruing due.
- (6) The buyer is entitled—
- (a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof ;
 - (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount ; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

Contract to the contrary.—As to what amounts to a contract to the contrary, see *Sada v. Tadepally* (1906), 30 Mad., 284; *Abdulla v. Mammali* (1910), 33 Mad., 446.

Duty of vendor to pay off subsisting incumbrance. Sub-section, 1, Cl. (g).—If a man enters into a written agreement in the words 'I agree to sell Blackacre,' the meaning is that he agrees to sell it free from incumbrances, there being an implied covenant in every conveyance that the land is free from incumbrances. *Ungley v. Ungley* (1876), 4 Ch. D., 73, 78; cf. sec. 7 of the English Conveyancing Act (1881). And even a vendor who contracts to sell such right and interests, if any, as he has, is bound to convey free from existing incumbrances. *Goold v. Birmingham, &c., Bank* (1888), 58 L. T., 650. Again where a vendor offers his property for sale under a *bonâ fide* belief that there is no charge upon it, but it turns out that there is an incumbrance affecting it, the ordinary rule is that the purchaser is entitled to have the charge cleared off out of the purchase-money, if he insists upon it. *In re Jackson and Oakshott* (1880), 14 Ch. D., 851, 855. But though a vendor professing to sell an unincumbered estate, but having in fact only an equity of redemption, as a general rule, will be compelled to redeem the mortgage and obtain a conveyance from the mortgagee, the court will relieve the vendor, if the amount of the incumbrance is likely to exceed the purchase-money. *Wedgwood v. Adams* (1844), 8 Beav., 103; *In re G. N. R. Co. and Sanderson* (1884), 25 Ch. D., 788. Cf. sec. 18 (c), Specific Relief Act. If the purchase-money remains unpaid, the purchaser may, under sub-section 5, cl. (b), retain out of it the amount of any incumbrance for the purpose of paying it off. *Sugden*, 552; *Dart*, 613, 814, 815. And an assignee, though for value and without notice of any particular incumbrance, of the unpaid purchase-money will take subject to such right of the purchaser. *Lacey v. Ingle* (1847), 2 Phillips., 413; *disting. Rayne v. Baker* (1859), 1 Gif., 241. Where a part of the purchase-money was retained by the purchaser not as a deposit on behalf of the vendor but as security that the property sold should be freed from existing incumbrances and a good title given to the purchaser, it was held that the purchaser was not bound to pay or tender the amount retained, until the vendor was prepared to pay the balance necessary to clear the incumbrances, and that no interest was chargeable on the amount until after notice of the vendor's readiness so to do. *Muhammad v. Muhammad* (1898), 26 I. A., 45; 21 All., 223. The purchaser should not part with the purchase-money without first seeing that the property is freed from incumbrances. *Kaudasomi v. Jagathamba* (1900), 10 M. L. J., 353. It may be here noticed that a purchaser under a contract to sell the mortgaged estate free from incumbrances may claim a conveyance of the

Implied
covenant to
convey free
from incum-
brances.

Purchase-
money re-
tained by
purchaser as
security that
property
should be free
from incum-
brances.

equity of redemption, so as to keep the mortgage on foot, provided he is able to procure a discharge of the vendor from all liability in respect of the mortgage-debt. *Cooper v. Cartwright* (1860), Johnson, 679. It is the duty of the purchaser to apply the purchase-money in payment of what is due to the mortgagees where there are two or more incumbrancers according to their priorities. *Greenwood v. Taylor* (1845), 14 Simon, 505. For an instance of application of the principle embodied in this clause in the case of the sale of a decree, see *Khetsidas v. Shib* (1904), 9 C. W. N., 178.

Right and
duty of pur-
chaser.

A deed of sale contained a covenant that "if to the property mentioned above any one offers obstruction of any sort or puts forth any claim thereto, we, our heirs, and our representatives agree to hold ourselves answerable in any way you require us to do." The purchaser had to redeem some of the lands mentioned in the deed which were subject to a mortgage. It was held that under sub-section 1, cl. (g), the purchaser was entitled to recover from the vendor the money expended in redeeming the portion of the property referred to in the deed of sale. *Manishanker v. Ramkrishna* (1904), 6 Bom. L. R., 832.

Sub-section 2.—The expression 'shall be deemed to contract' in this sub-section makes the covenant implied by it part and parcel of the transaction and it is to be deemed to be embodied in the document. *Chidambaram v. Sivathasamy* (1904), 15 M. L. J., 396. A contract to the contrary relied on by the seller must be expressed in plain and unambiguous language. *Digambar v. Nishibala* (1910), 15 C. W. N., 655.

Implied
covenant
deemed to be
embodied in
document.

Where the seller and the buyer are both coparceners in joint property part of which is sold, the buyer takes the property subject to the liability to partition of the joint property, and if the buyer is deprived of possession as a result of the partition-proceedings he has no remedy against the seller whose interest was well known to the buyer. *Shivram v. Bal* (1902), 26 Bom., 519.

Covenant against incumbrances and covenant to pay them off.—There is no difference in principle in the English law between the two. *Lethbridge v. Mytton* (1831), 2 B. & Ad., 772; and see *Mayne on Damages*, 6th Ed., pp. 224, 225. But the American law is different. See Sedgwick, secs. 967 *et seq.*

Vendor's Lien. Sub-section 4, Cl. (b).—See pp. 127-131, *Statutory Lien ante*. The charge which a vendor obtains under this section is different in its origin and nature from the vendor's lien given by the English Courts of Equity to an unpaid vendor. The Indian Act gives a statutory charge upon the estate to an unpaid vendor, unless it is excluded by contract, and such a charge stands in quite a different position from

Statutory Lien
in India.

There must be a vendor's lien under the English law. *Webb v. Macpherson* (1903), 31 I. A., 238; 31 Cal., 57. There must be a real sale to give rise to a lien. Thus, in one case where a testator gave a legacy to his daughters on condition that they should convey to his sons certain shares in real estate, and the daughters conveyed, but were not paid the legacies, it was held that the transaction was not a sale and that the daughters had no lien on the land conveyed by them. *Barker v. Barker* (1870), 10 Eq., 438. But when the court is compelled to treat a nominal purchaser as real, the ostensible vendor may claim a lien on the estate for the apparent consideration. *Leman v. Whitley* (1828), 4 Russ., 423. Where owelty is allowed on partition it will, in equity and good conscience, be a lien on the property on account of which it has been awarded, and such lien has precedence over prior mortgages and other liens existing against the cotenant against whom the owelty was awarded. See p. 411 *ante*. The lien of the vendor will arise, though the consideration may be an annuity or payable by instalments. *Matthew v. Bowler* (1847), 6 Hare, 110; *Nives v. Nives* (1880), 15 Ch. D., 649; see also Sugden's Vendors and Purchasers, p. 676; *disting. Clarke v. Royle* (1830), 3 Sim., 499; *Dixon v. Gayjere* (1857), 1 DeG. & J., 655; *Buckland v. Pocknell* (1843), 13 Sim., 406. The lien will also arise, though the consideration may be payable at a future date, as within a given time from the vendor's death. *Winter v. Lord Anson* (1827), 3 Russ., 488; *Parkes, Ex-parte* (1822), 1 Glyn. & J., 228. But where a man conveys a piece of land for the construction of a public work in consideration of an annual payment, as it would not be reasonable to suppose that the vendor meant to reserve to himself a right at some future time to enter and destroy the public work, if the annual rent should fall into arrear, there can be no lien in such a case for unpaid rent-charge. *Earl of Jersey v. Briton, &c., Co.* (1869), 7 Eq., 409; *disting. Eyton v. Denbigh, &c., Co.* (1869), 7 Eq., 441. The lien may exist for part of the consideration, though it fails as to the residue. *Mackreth v. Symmons* (1808), 15 Ves., 329. A third person by merely advancing money for the purchase of an estate does not acquire any charge on it. See p. 130, *ante*; *disting. Bird v. Philpott* (1900), 1 Ch., 822. Nor can any lien be claimed by the vendor for money advanced by him to the purchaser for improvements. See p. 131, *ante*. As to the vendor's right to interest, see *Muthia v. Sinna* (1911), 35 Mad., 625.

Lien on fixtures.—*In re Vulcan, &c., Co.* (1888), W. N., 37; cf. *In re London, &c., Co.* (1888), 58 L. T., 798.

Lien of lessor for unpaid premium.—In England unpaid premium for a lease is treated as purchase-money, and the lessor

Owelty
allowed on
partition.

Third person
cannot claim
lien.

is entitled to a lien for it. *Shepherd v. Beetham* (1877), 6 Ch. D., 597. See also *Elliot v. Edwards* (1802), 3 B. & P., 181. But it does not appear that such a lien has been recognised in favour of the lessor in this country.

Does the lien extend to other property than land ?—See *Collins v. Collins* (1862), 31 Beav., 346; *In re Albert, &c., Co.* (1870), L. R., 11 Eq., 164, 178; *Davies v. Thomas* (1900), 2 Ch., 462; *In re Stuckley* (1906), 1 Ch., 67. Lien whether extends to other property.

Vendor's right to stand in place of trustees.—Where a trustee can claim indemnity out of the trust-estate, the vendor has a right by subrogation to stand in the place of the trustee; but not, if the contract for sale was unauthorized by the trust. *Ecclesiastical Commissioners v. Pinney* (1900), 2 Ch., 735.

Waiver of vendor's lien.—See p. 128, *ante*. The charge created under this section is not excluded by a mere personal contract to defer payment of a portion of the purchase-money or to take it by instalments, nor is it excluded by any contract, covenant, or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge. *Webb v. Macpherson* (1903), 31 I. A. 238; 31 Cal., 57. But to negative this statutory charge it is sufficient if 'a contract to the contrary' arises by implication. *Abdulla v. Mammali* (1910), 33 Mad., 446. Though the lien is not destroyed by the vendor's taking security by bond or covenant, *Mackreth v. Symons* (1808), 15 Ves., 328; *Grant v. Mills* (1813), 2 V. & B., 306, if the security itself and not the sum secured is the real consideration for the sale, the vendor cannot insist on his lien, for he has already got all that he bargained for. *Clarke v. Poyle* (1830), 3 Sim., 499; *In re Brentwood, &c., Co.* (1876), 4 Ch. D., 562. The taking of a mortgage, for instance, for a part of the purchase-money or a mortgage upon another estate, though not decisive, would be strong evidence of an intention to give up the lien. *Winter v. Lord Anson* (1823), 1 Sim. & St., 434. Again, though the lien will not be extinguished by the vendor merely giving a receipt for the purchase-money, it will be lost if the receipt is given under circumstances which are inconsistent with its retention. *Muir v. Jolly* (1858), 26 Beav., 143. But the vendor will not waive his lien by merely taking a bill of exchange. *Grant v. Mills* (1813), 2 V. & B., 306. The lien will also not be lost, where there is only a payment by account to the vendor's agent. *Wront v. Daves* (1858), 25 Beav., 369; *Wilson v. Keating* (1859), 4 DeG. & J., 588. Nor is there any presumption of an intention to relinquish his lien by a vendor if he takes a promissory note from a person other than the purchaser. *Karupiah v. Hari* (1910), 21 M. L. J., 849. Lien how excluded
Where vendor takes a bill of exchange or a promissory note.

Loss of lien.

Vendor's lien how lost as against third parties.—See *Smith v. Evans* (1860), 28 Beav., 59; *Rice v. Rice* (1853), 2 Drew., 73; *White v. Wakefield* (1835), 7 Sim., 401; *Price v. Blakemore* (1843), 6 Beav., 507; *Muir v. Jolly* (1858), 26 Beav., 143; *Kettlewell v. Watson* (1884), 26 Ch. D., 501.

A vendor is estopped from claiming a lien for unpaid purchase-money against a mortgagee for value without notice from the purchaser, by his declaration in the sale-deed of the receipt of the purchase-money and by handing over the title-deeds to the purchaser. *Tehilram v. Kashibai* (1908), 33 Bom., 53.

Enforcement of the lien.

Vendor's lien how enforced and against whom.—The lien must be realized by sale by the vendor in the usual way in the presence of persons who claim subsequent charges on the property. *Hope v. Booth* (1830), 1 B. & Ad., 498; *Rome v. Young* (1838), 3 Y. & C., 199; 4 Y. & C., 204; *Guide, Exp.* (1823), 1 Glyn & J., 323; *Nash v. Worcester, &c., Commissioners* (1855), 1 Jur. (N.S.), 973; *Attorney-General v. Sittingbourne, &c., Co.* (1866), 1 Eq., 636; see also Dart, 739; 2 W. & T., L. C., 949, 950; Seton, 2290-2; Fry, secs. 1177-79, and the notes to sec. 100, *post*. A judgment-creditor of the vendor may attach the unpaid purchase-money which is due to his judgment debtor and enforce his lien on the property. *Moti v. Bhaywan* (1909), 31 All., 443. When unpaid vendors remain in possession after sale they are not bound to sue to enforce their lien, as they have a right to retain possession until the purchase-money is paid. *Subrahmania v. Poovan* (1902), 27 Mad., 28. See also *Baijnath v. Paltu* (1908), 30 All., 125, where in a suit for possession the property sold was ordered to be delivered to the purchaser on payment of the purchase-money. But see *Velayutha v. Gobindasami* (1907), 30 Mad., 524, where it was held that the lien of an unpaid vendor under this section is non-possessory and he is only entitled to retain possession of the title-deeds. Whether an injunction would be granted to restrain a Railway Company from running trains at the instance of an unpaid vendor, see *Lycett v. Strafford, &c., Co.* (1872), 13 Eq., 261; *Allgood v. Merrybent, &c., Co.* (1886), 33 Ch. D., 571. See also Dart., 740, 1106, 1107; 2 W. & T., L. C., 938, 939. The vendor's lien may be enforced not only against the vendee but also against any person who is not a *bona fide* purchaser for value: *Webb v. Macpherson* (1903), 31 I. A., 238, 31 Cal., 57, where it was enforced, against persons who purchased with notice directly as also at a sale in execution of a decree. Cf. *Kettlewell v. Watson* (1884), 26 Ch. D., 501; see also Dart., pp. 730, 731. *Jagool v. Parbutty* (1865), 3 W. R., 138, in which a contrary rule has been laid down, is clearly bad law; disting. *Smith v. Evans* (1860), 28 Beav., 59. It is true there is a difference between the language of

Against whom lien may be enforced.

cl. (b), sub-section 4, and that of cl. (b), sub-section 6; as the latter clause expressly provides for the enforcement of the charge on the property not only against the seller, but also against all persons claiming under him with notice of the payment, while the former merely gives a charge upon the property in the hands of the buyer. But the rule that a difference of language *prima facie* indicates a difference of meaning can only be applied with considerable reservations in the construction of Indian Statutes. It may also be noticed that even the language of cl. (b), sub-section 6, is not very precise, for it would apparently exclude not merely *bona-fide* purchasers for value, but also volunteers who take without notice of the payment. In England an assignee of leaseholds is always treated as an assignee for value. *Harris v. Tubb* (1889), 42 Ch. D., 79. But there is apparently no case in which this rule has been followed here.

Effect of difference in language.

Period of Limitation.—There was some difference of opinion on the question whether Art. 111 or 132 of Act XV of 1877 was applicable, see *Virchand Lalchand v. Kumaji* (1892), 18 Bom., 48; *Chunilal v. Bai Jethi* (1897), 22 Bom., 846; *Har Lall v. Muhamdi* (1899), 21 All., 454; but see *Natesan v. Soundararaja* (1897), 21 Mad., 141; *Avuthala v. Dayumma* (1900), 24 Mad., 233; *Seshachala v. Varada* (1901), 25 Mad., 55; *Subrahmania v. Poovan* (1902), 27 Mad., 28. Cf. *Webb v. Macpherson* (1903), 31 L. A., 238; 31 Cal., 57; *Ramakrishna v. Subrahmania* (1905), 29 Mad., 305; *Munir-un-nissa v. Akbar* (1908), 30 All., 172. The wording of Art. 111 of the present Limitation Act (IX of 1908) is different, and it is applicable only to a suit for personal payment of unpaid purchase-money, and so has put an end to the controversy.

Period of limitation.

As to when the time commences to run, see *Toft v. Stevenson* (1854), 5 DeG. M. & G., 735.

Marshalling, including order of liability of parcels sold by the vendor to sub-purchaser.—The principle is the same as in a case of an express mortgage. Jones, sec. 227; see also Sugden, 679, 680. Cf. *Aldrich v. Cooper*, 1 W. & T., L. C., 36.

Where the whole of the purchase-money, &c. Sub-section 3.—This is a departure from the English law, for which see Dart., 731.

Sub-section 5, cl. (d).—It was suggested in one case that this clause may have the effect of transferring the personal liability of the mortgagor to the purchaser. *In the matter of a reference from Board of Revenue* (1883), 10 Cal., 92. But see p. 280, ante; disting. *Thurston v. Nottingham, &c., Society* (1901), 1 Ch., 88. The buyer is bound to indemnify the seller. *Ram v. Sheodeni* (1912), 16 C. W. N., 1040.

Obligation of buyer purchasing subject to incumbrances.

The liability of the vendee to pay the public charges on the property sold attaches, in the absence of a contract to the contrary, as an incident of the transfer and is complete when the property passes. *Arunachella v. Rangiah* (1906), 29 Mad., 519. *The Chairman, Nellore ; v. Dwarapally* (1907), 30 Mad., 423.

Purchaser's
lien.

Purchaser's Lien. Sub-section 6, cl. (d).—See pp. 131, 132, *ante*. The ground on which the payment of the deposit or part payment to the vendor creates a lien for the amount paid on the latter's interest in the land is thus stated by Lord Cranworth: "There can be no doubt, I apprehend," says his Lordship addressing the House of Lords, "that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is in equity considered as the owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that to the extent to which he has paid his purchase-money to that extent the vendor is a trustee for him, in other words that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money, the vendor had executed a mortgage to him of the estate to that extent." *Rose v. Watson* (1864), 10 H. L., 672, 683. But this somewhat artificial reasoning cannot hold good in this country, specially in face of the provisions of sec. 54 of the Act. The statement sometimes made that the lien of the purchaser rests on natural justice is also objectionable; though perhaps the purchaser's lien stands on a slightly higher footing than the lien of the vendor who can always say 'I will convey the estate when the purchase-money is paid but not till then.' *Wythes v. Lee* (1855), 3 Drew., 396; 25 L. J., Ch. 177. As to the extent of the lien, see *Colyer v. Clay* (1843), 7 Beav., 188. The lien is not strictly confined in the English law to a case of simple purchase; but extends to the case of a lease, and entitles an intended lessee who has entered under the contract and expended money, to a lien on the lessor's interest. *Middleton v. Magnay* (1864), 2 H. & M., 233; *disting. Wallis v. Smith* (1882), 21 Ch. D., 243. The lien may also be claimed by a sub-purchaser; so that where *A* sold to *B* and received part payment from him, and *B* sold to *C* and received part payment from him, *C* was held entitled to a lien on *B*'s interest in *A*'s estate. *Aberaman Ironworks v. Wickens* (1868), 4 Ch., 101. The purchaser may also claim in the English law a lien on the purchase-money if he is evicted from the property, but of course this right cannot be exercised, if the money is not earmarked, or against an assignee for value. *Cator v. Earl of Pembroke* (1783), 1 Bro. C. C., 301; 2 *ib.*, 282; cf. *Wythes v. Lee* (1855), 3 Drew., 396, a case of purchase. With regard to a purchaser's lien for compensation, see *Barker*

Extent of the
purchaser's
lien.

When the
purchaser is
evicted from
the property.

v. Cox (1876), 4 Ch. D., 464. The purchaser will not forfeit his lien, simply because he cannot obtain specific performance. *Rose v. Watson* (1864), 10 H. L. C., 672; *Howe v. Smith* (1884), 27 Ch. D., 89; *Lalchand v. Lakshman* (1904), 28 Bom., 466; cf. *Levy v. Stogdon* (1898), 1 Ch., 485, where the assignee was allowed to enforce the charge. But if the contract is not completed owing to the default of the purchaser, no lien can be claimed by him. *Nairn v. Prowse* (1802), 6 Ves., 751; *Esdaile v. Oxenham* (1824), 3 B. & C., 225; *Dinn v. Grant* (1852), 5 DeG. & S., 451; disting. *Mirasa v. Abdul* (1897), 7 M. L. J., 234; *Kenny v. The Administrator-General of Bengal* (1869), 3 B. L. R., o. c., 75; W. R., Supl. Vol. I, 330. *A fortiori*, where the contract is illegal; *Ewing v. Osbaldiston* (1836), 2 My. & C., 53, 58; *Harrison v. Southcote* (1751), 2 Ves., S. 389, 393; *Mackreth v. Symmors* (1808), 15 Ves., 337.

Lien where conveyance is set aside.—Where a conveyance is set aside on the ground of fraud, it is allowed to stand as a security for the money actually advanced by the purchaser. *Sadashira v. Dhakubai* (1880), 5 Bom., 450; cf. *Clark v. Maplas* (1862), 31 Beav., 80; 4 DeG. F. J., 401; *Baker v. Monk* (1864), 33 Beav., 419; 4 DeG. J. & S., 388.

For the amount of any purchase-money, &c.—If the purchaser properly declines to complete the purchase, he can claim a lien for the costs of a suit to compel performance of the contract. *Middleton v. Maguay* (1864), 2 H. & M., 233; *Turner v. Marriott* (1867), 3 Eq., 744. The purchaser has a lien on the property for his deposit when he rescinds the contract for purchase in exercise of a power given by it. *Whitbread & Co. v. Watt, C. A.* (1902), 1 Ch., 835. The purchaser can also claim the costs for investigating the title. *In re Yielding* (1886), 31 Ch. D., 344; *In re Higgins* (1882), 21 Ch. D., 95; *In re Furneaux* (1906), W. N., 215. The English law on the subject is thus summed up in Fry, § 1482. "The lien in the case of a purchaser extends to all instalments of the purchase-money; interest thereon at 4 per cent. per annum; sums paid under the contract as interest on the unpaid purchase-money, interest thereon; and the costs of an unsuccessful action by the vendor against the purchaser."

To the extent of the seller's interest in the property.—Where a mortgagee sells under a power, the lien can only be enforced against the mortgagee to the extent of his interest. *Wythes v. Lee* (1855), 3 Drew., 396.

For the mode in which the lien may be enforced.—See Fry, § 1484. For form of decree where contract is rescinded, see *Torrance v. Bolton* (1872), 14 Eq., 124, 136; 8 Ch., 118; cf. *Westmacott v. Robins* (1862), 4 DeG., 390; where to remove all difficulties which

When charge
may be
enforced.

For what sums
there may be
a lien.

Mode in
which lien
may be
enforced.

might arise from the prayer of the original bill, a supplemental bill was filed by the purchaser.

When the lien will prevail against a mortgage by the vendor, see *Rose v. Watson* (1864), 10 H. L. C., 672.

Sale of one of two properties subject to a common charge.

56. Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

Meaning of the word 'charge.'

Where two properties are subject to a common charge.—

The word 'charge' will include a mortgage; though it may be a question whether in the case of a purely equitable charge the residue can be followed by the first purchaser in the hands of a subsequent purchaser for value without notice. *Ram Lochan v. Ram Narain* (1877), 1 C. L. R., 296, 313.

Right only enforceable against the seller and out of the 'other property.'

The buyer is as against the seller.—It has been said that this does not involve the right of the purchaser to claim marshalling. But it is one thing to say that the rights of the creditor must not be diminished or unduly hampered, and quite another thing to affirm that the right given by the section to the purchaser can be enforced only against the owner of the incumbered property. Thus, in Ireland, where a purchaser of part of the mortgaged estate is a defendant, a decree is made for a sale of a competent part with a proviso that the plaintiff shall not resort to the purchaser's part of the estate, unless the remainder of the lands and premises should prove insufficient. *Webb v. Blessington* (1828), 3 Moll., 123. See the subject discussed, pp. 360—365, *ante*. Be this as it may, it is well established that the election of the mortgagee does not determine the ultimate incidence of the mortgage-debt. *Galton v. Hancock* (1742), 2 Atk., 424, 438.

In the absence of a contract to the contrary.—See the note to sec. 55, *supra*. For a case in which it was held that the mere assent of the owner to a sale does not imply an intention to release the mortgaged property, see *Clarke v. Rodkin* (1851), 13 Ir. Eq., 492. Notice is immaterial. *Lakhmidas v. Jamnadas* (1896), 22 Bom., 304; cf. *Chunilal v. Fulchand* (1893), 18 Bom., 160.

Successive sales by mortgagor: Rules of apportionment.

Successive sales by the mortgagor.—See pp. 365—368, *ante*; cf. *Ram Lochan v. Ramnarain* (1877), 1 C. L. R., 296, 315, 316; *Hamilton v. Royse* (1804), 2 Sch. & L., 315, 328. It should be noticed that the ruling of Lord Plunkett in *Hartley v. O'Flaherty* (1835), Ll. & G., *temp.*, Plunk., 208, was followed with some hesitation in *Handcock v. Handcock* (1850), 1 Ir. Ch., 444, where Lord Chancellor Brady said:

"Perhaps the common law doctrine has been overstepped in those cases; however, they have been more than once acted upon, and must be regarded as the settled law of this court, and must, as I think, govern the present case." Again in *Stronge v. Hawkes* (1859), 4 DeG. & J., 632, 652, Lord Justice Turner said: "The cases in Ireland seem to have gone to a great length upon this point, some of them, I think, to a length which I should hesitate long before I should be inclined to follow, although I do not mean to say that I dissent from those cases, as further consideration might, perhaps, lead me to a different conclusion." Irish cases commented on.

For a *résumé* of the law on the subject see Lewin on 'Trusts, pp. 927—930, where the learned author says that the principles which have been acted upon in Ireland will no doubt be followed to some extent in England. When, however, the first purchaser expressly takes subject to the mortgage, he has, of course, no equity as against the mortgagor that the portion still held by the latter shall be first applied to the payment of the incumbrance; and having no equity against him, he has none against his grantee. By taking such a deed, he consents that the land shall remain subject to its *pro rata* share of the debt. Jones, s. 595; *In re Mower's Trusts* (1869), 8 Eq., 110; cf. *Ram Loohan v. Ram Narain* (1877), 1 C. L. R., 296, 316. Principles to be followed.

For the difference between a covenant against incumbrances entered into by an owner and one entered into in the exercise of a power, see *Stronge v. Hawkes* (1859), 4 DeG. & J., 632, 653.

Where part of the estate has been given in exchange.—The right of the person who receives it is the same as if it had been sold to him for money. *Kirkham v. Smith* (1749), 1 Ves. Sen., 257, 261; and as to the effect of a sale by the court, see *Lloyd v. Jones* (1803), 9 Ves., 61.

Marshalling in the case of voluntary conveyances—See p. 361, *ante*; see also *Anstey v. Newman* (1870), 39 L. J., Ch., 769; *Aldridge v. Forbes* (1839), 9 L. J., Ch., 37; cf. *Bouzman v. Johnston* (1830), 3 Sim., 377; *Lomas v. Wright* (1833), 2 My. & K., 769; *Clarke v. Brereton* (1834), 1 Jones, 165.

Discharge of Incumbrances on Sale.

57. (a) Where immovable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, Provision by Court for incumbrances, and sale freed therefrom.

- (1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers, will be sufficient, by means of the interest thereof to keep down or otherwise provide for that charge, and
- (2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

Subject to any incumbrance.—See pp. 454—458, *ante*. It may be noticed that there has been no reported case on the section up to this time, and the machinery provided by it is likely to rust for want of use. As the law stood before, a purchaser could always get off a bargain if there was a charge on the estate, however insignificant, such as a small legacy payable in future. But the section presupposes the existence of an incumbrance. If, therefore, there is a question whether there is an incumbrance, or not, it cannot be determined under the section; though the court will decide a question of construction involving the determination of interests in future, if the decision of such question is necessary in order to ascertain what sum of money ought to be set aside to answer the incumbrances. *In re Freme's Contract* (1895), 2 Ch., 256; distinguishing *Milford, &c., v. Mowatt* (1884), 28 Ch. D., 402. It has been held in England that applications under this section must be made in chambers and directions cannot be given by the court at the hearing. *Patching v. Bull* (1882) 30 W. R. (Eng.), 244. The order should follow the words of the section, and contain liberty to apply for a declaration that the land is freed from the incumbrance. *Dickin v. Dickin* (1882), 30 W. R. (Eng.), 887. For forms, see Daniell's C. F., pp. 670, 671, 1221, and notes thereto. Where the purchase-money greatly exceeds the incumbrances, the land may be freed on its payment into court. *Archdale v. Anderson* (1877), 21 L. R. Ir., 527.

Annual sums charged upon land in perpetuity.—There is no provision in the Act corresponding to section 45, Conveyancing Act, 1881, which provides a general method for the redemption of rent-charges or other annual sums issuing out of land. And it seems to be doubtful whether this section would apply to a perpetual rent-charge secured upon land by Statute. *In re Great, &c., Co.* (1884), 25 Ch. D., 788.

Dispute as to
existence of
incumbrance
not within
the section.

No provision
for redemption
of rent
charges.

Where mortgagee has option to purchase.—See *Milford, &c., Co. v. Mowatt* (1884), 28 Ch. D., 402, where, however, Pearson, J. seems to have thought that there was not a *bond-fide* intention of exercising the option.

This section does not apply to a case where a question of the adjustment of a decree out of court is involved. *Mallikarjuna v. Narasimha* (1901), 24 Mad., 412.

CHAPTER IV.

OF MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES.

“Mortgage,”
“mortgagor,”
“mortgagee,”
“mortgage-
money” and
“mortgage
deed” de-
fined.

58. (a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

Simple
mortgage

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Mortgage by
conditional
sale.

(c) Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that no such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

(d) Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee. Usufructuary mortgage.

(e) Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage. English mortgage.

A mortgage on land is immovable property. *In re Hoyles* (1911), 1 Ch. 179 and see pp. 66, 70 *ante*.

Definition of a mortgage.—See pp. 64—66, *ante*, and compare the definition of a mortgage in the New York Code, section 1603. Mortgage defined.
 “Mortgage is a contract, by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession.” A mortgagor in possession of a freehold tenement in England is possessed of an estate of freehold in the mortgaged premises. *Copestake v. Hoper* (1907), 1 Ch., 366. In English law though a mortgage does not of itself imply a debt by specialty, every mortgage implies a loan and every loan a debt. *King v. King* (1735), 3 P. Wms., 358; *Yates v. Aston* (1843), 4 Q. B. 182; *Hudges v. Croydon Canal Co.* (1840), 2 Beav., 86. A mortgage in this country, however, does not always imply a debt. See clause (a), section 63, *post*. The definition of a mortgage is, therefore, not faultless, as the right created by it is not necessarily an accessory right. Though no particular form of words is ne-

What consti-
tutes a mort-
gage.

ecessary to constitute a mortgage, an intention to create a security must be shewn on the part of the debtor. See the cases cited in note 1, p. 145, *ante*. And this only can be done by the transfer by the mortgagor of an interest in some specific property to secure the discharge of his obligation. See pp. 169—174, *ante*. See also *Niaz v. Mangu* (1908), 5 A. L. J. 723, where the terms of an indemnity-bond were held to amount to a mortgage; cf. *Ramdoyal v. Ramkolpa*, W. R. (1864), 325; *Kurreem v. Ummu*, No. 17 of 1866, Civil, Punj. Rec.; *Ram Narain v. Pural*, No. 20 of 1866, Civil, Punj. Rec.; *Mohamudjin v. Jai Ram*, No. 74 of 1878, Civil, Punj. Rec. But an instrument whereby a person pledges the whole of his property without any further specification, may create a valid charge. See pp. 170—172 *ante*, and the notes to section 100, *post*. An instrument by which the payment of money is secured on land, must be taken to create a mere charge, unless there is an indication in it that some interest in specific immovable property was transferred. *Royzuddi v. Kalinath* (1906), 33 Cal., 985; 4 C. L. J., 219; *Baldeo v. Murli* (1912), 10 A. L. J. 120. A sale followed by an agreement to reconvey does not amount to a mortgage. *Uttandi v. Ragavachari* (1905), 29 Mad., 307. In *Mammikkutti v. Puzakkal* (1906), 29 Mad., 353, the document was held not to create a mortgage or charge on immovable property but a mere exclusive license to cut trees. The word *Muakhizu* used in a deed does not necessarily imply a power of sale, and in the absence of anything else the deed can not be construed as a mortgage. *Dalip v. Bahadur* (1912), 34 All., 446. cf. *Bhola v. Bishnath* (1912), 10 A. L. J., 162.

Ascertainment
of subject-
matter of
mortgage.

Subject-matter of mortgage how ascertained where there is no precise description of it in the mortgage-deed.—See p. 169, *ante*; see also *Glynn, Exr., Medley, In re* (1840), 9 L. J., Bk., 41; *Young v. Wallingford* (1883), 52 L. J., Ch., 530; *Early v. Rathbone* (1888), 57 L. J. Ch., 652; *Francis v. Minton* (1867), L. R., 2 C. P., 543; cf. *Pryce v. Bury* (1853), 2 Drew, 11; *Ram Lall v. Harrison* (1880); 2 All., 832; but see *Jhinks v. Baldeo* (1892), 14 All., 509, where the Allahabad Court held that a mortgage of a certain share in an estate which did not define or specify the share was void, because it might refer either to a share which had been previously mortgaged to another person or to an unincumbered share belonging to the mortgagor.

What can pass
under the
security.

Property passing under the security.—(1) **Business and good-will.**—See pp. 282, *ante*. (2) **Fixtures.**—See pp. 283—286, *ante*; cf. *Smith v. Maclure* (1884), 32 W. R., (Eng.), 459; *Hawtry v. Butlin* (1873); L. R., 8 Q. B., 293; *Sanders v. Davis* (1885), 15 Q. B. D., 218; *Lentley, Ex parte* (1842), 2 Mt., D. & D., 591;

Tottenham v. Swansea Zinc Ore Co. (1885), 52 L. T., 738; *Metropolitan &c., Society v. Brown* (1859), 26 Beav., 454; *Sheffield Society v. Harrison* (1881), 15 Q. B. D., 358.; *London, &c., Mills Co., In re* (1888), 58 L. T., 798. (3) *Stock in Trade*.—See pp. 105, 180, *ante*; see also *Jardine, Ex parte* (1875), L. R., 10 Ch., 322; *Stephenson, Ex parte* (1847), 1 DeG., 586. Cf. *Tapfield v. Hillman* (1848), 6 M. & G., 245.

Where other property is substituted for mortgaged premises.—See pp. 273, 287, 291—294, *ante*; see also *Muthia v. Appala* (1910), 34 Mad., 175; 20 M. L. J. 394; *Lakshman v. Gopal* (1898), 23 Bom., 385; *Postlethwaite v. Maryport, &c., Trustees* (1869), 20 L. T., 138; *disting. Lloyd v. Douglas* (1841), 4 Y. & C., 448; cf. *Harrison v. Barton* (1860), 1 J. & H., 287; *Glynn, Exp.* (1840), 9 L. J. Bk., 41, where the bankrupt mortgagor's assignee's claim in respect of money paid for owelty of partition was not allowed against the mortgagee's charge on the land allotted to the mortgagor in severalty in lieu of the undivided share which was the original subject of mortgage.

What will pass under a mortgage of all his estate or interest of a party, where such interest is vested in him in a different character.—See p. 192, *ante*; cf. *Johnson v. Webster* (1854), 4 DeG. M. & G., 488; *Barrow v. Griffith* (1865), 13 W. R. (Eng.), 41. But where a person has some beneficial interest in property vested in him as trustee or executor, it may be shown from the terms of the deed that he did not intend to pass the whole property. *Stronge v. Hawkes* (1853), 4 DeG. M. & G., 186; *Brettie, In re* (1864), 2 DeG. J. & S., 244; *Nooper v. Harrison* (1855), 2 K. & J., 85. Where an entire zemindary was mortgaged 'with our entire right and income,' it was held that a simple mortgage which the zemindar held on an *inam* village in the zemindary was not a part of the mortgage-security. *Bhimaraju v. Sri Kunja* (1901), 25 Mad., 42; 11 M. L. J., 327. For a case of false personation, see *In re Cooper* (1881), 20 Ch. D., 611; and see on the subject generally Norton on Deeds, pp. 272—275. *Disting. Grieseson v. Kersopp* (1842), 5 Beav., 283; *Francis v. Minton* (1867), L. R., 2 G. P., 543, where the decision was based on "the facts and the frame of the deed."

Agreement for mortgage and specific performance.—See p. 70, *ante*; see also *Firth v. Skingoby* (1868), 58 L. T., 481; *Humble, In re* (1860), 11 Ir. Ch., 132; *Parish v. Poole* (1864), 53 L. T., 35; *Mathews v. Goodday* (1862), 31 L. J. Ch., 262; but see *Jameyal v. Sultana* (No. 59 of 1873, Civil) Punjab Record. *Disting. Bunning v. Bunning* (1923), 1 L. J. (s. s.) Ch., 56. It should be noticed that where a debtor agrees to execute a mortgage with the usual covenants, the deed should contain a covenant to pay. *Saunders v. Hillsome* (1854), 2 Eq., 573.

Where mortgaged property assumes a new form.

Where property vested in mortgagor as trustee.

Agreement to execute mortgage.

When there is breach of contract of mortgage.

Damages for not executing or completing a contract of mortgage.—Any compensation beyond expenses out of pocket such as interest for the money while lying idle must be the subject of express stipulation. *Sweetland v. Smith* (1833), 1 Cr. & M. 585. Reasonable costs in case the loan went off would not include commission charged by the lender's bankers for withdrawing his money from deposit. *Re Blakesley* (1863), 32 Beav. 379. As to the measure of damages, see *Duckworth v. Kwart* (1863), 2 H. & C., 129. See also the cases cited at p. 70, *ante*. It has been held in Allahabad that if the whole of the money is not advanced by the mortgagee, the mortgagor may recover the balance together with such other loss as he may prove to have sustained in consequence of the mortgagee's breach of the covenant. But the cases cited in the judgment hardly support the proposition. It would, however, seem that such an action is not one for specific performance but for damages and will be governed by Art. 116 of Sch. II of the Limitation Act. *Naubat v. Indar* (1890), 13 All., 200. And see *Phul Chand v. Chand* (1908), 30 All., 252, where the mortgagor was said to be entitled to recover, if anything, damages for breach of contract. Be this as it may, the lender may be relieved even after the execution of the mortgage from making any advance on the discovery of the mortgagor's fraud. *Brown v. Stepney* (1827), Beat., 388; cf. *Subha Rau v. Devusheth* (1894), 18 Mad., 126; *Boyd v. Craster* (1864), 10 L. T. 480; 12 W. R., (Eng.), 787.

Rectification of deeds or agreements to mortgage.—See p. 167, *ante*; see also *Metropolitan, &c., Society v. Brown* (1859), 26 Beav., 454; *National Provincial Bank of England, Ex parte Boulter, In re* (1876), 4 Ch. D., 241; *disting. Hawkins v. Jackson* (1850), Mac. & G., 372.

Mortgagee's paramount right.

Paramount right of mortgagee.—As a mortgagee transfers to the mortgagee an interest in the property pledged to him, he will not, as a rule, be bound by any subsequent act of the mortgagor, unless it is done by him as agent for the mortgagee. See pp. 200—202, 309, *ante*. See also *Watt v. Driscoll* (1901), 1 Ch., 294, where it was held that an arrangement made between the mortgagor and his partner would not override the rights of the mortgagee. *Disting. In re Borax Co.* (1901), 1 Ch., 326. See also *The Celtic King* (1894), P., 175; *disting. The Heather Bell* (1901) P., 143. A mortgagee cannot ordinarily grant a lease without the concurrence of the mortgagee which will be binding upon the mortgagee. *Wazir v. Moti* (1905), 2 A. L. J., 294. cf. *Adanki v. Moti* (1912), 9 A. L. J., 759. *Madan v. Raj* (1912), 17 C. L. J. 384.

Sub-mortgages.—Where there is a sub-mortgage, the security comprises *first* the personal covenant of the sub-mortgagor, and *secondly*, the transfer of the original mortgage-debt and mortgaged property with the benefit of all powers and remedial clauses contained

in the original mortgage. It follows that a mortgagee after notice given to the debtor cannot deal with the latter so as to prejudice the sub-mortgage. *Re Rurrell* (1869), 7 Eq., 399; *disting. Gurney v. Seppings* (1846), 2 Phillips, 40, 42. If the mortgagor becomes bankrupt, the sub-mortgagee may prove for the whole original debt, but he cannot receive more than his own principal, interest and costs. *Re Rurrell*, *supra*.

Capacity to mortgage.—See pp. 181—194, 663, 664, *ante*, see also *Landowners & Co. v. Ashford* (1880), 16 Ch. D., 411, 436, 437. Cf. *Brown v. Sheffield, &c., Bank* (1876) 24 W. R., (Eng.), 948, on the construction of powers; see also *Surja Prasad v. Golab Chand* (1900), 27 Cal., 762, on the authority of a Mitakshara father to mortgage ancestral property. *Gendan v. Inder* (1906), 3 C. L. J., 537, where a mortgage by a manager of a joint estate who was not lawfully appointed was held to bind the major co-sharer only. A mortgage by a minor is absolutely void. *Maharaj v. Balwant* (1906), 28 All. 508; *affd. Balwant v. Clancy* (1912), 34 All., 296; 15 C. L. J. 475. As to the authority of a mercantile agent to pledge, see *Oppenheimer v. Attenborough* (1907), 1 K. B., 510. Where one of two executors pledged articles belonging to the testator and misapplied the money advanced to his own purposes, but the pledgor had not purported to act as executor and the pledgees had no notice that he was executor, it was held that the pledgees has acquired no title by the pledge. *Salomon v. Attenborough* (1912) 1 Ch. 451.

Who can mortgage.

Validity of mortgage taken without notice notwithstanding an injunction and the appointment of a receiver.—See notes to sec. 7, *ante*; cf. *Wigram v. Buckley* (1894), 3 Ch., 483.

Estoppel between mortgagor and mortgagee.—Pp. 260, 295-302, 330, *ante*. *Gurbasappa v. Rango* (1912), 36 Bom 539. For cases of estoppel based upon misrepresentation made to the mortgagee, by which he has been induced to advance money on mortgage, see *London, &c., Co. v. Suffield* (1897), 2 Ch., 608; cf. *Middleton v. Pollock, Ex parte Wetheral* (1876), 4 Ch. D., 49; *disting. Wall v. Cockerell* (1863), 10 H. L.C., 229.

Estoppel between mortgagor and mortgagee.

Capacity to accept mortgage.—Pp. 194-195, *ante*; see also notes under sec. 6, p. 662, *ante*.

For the distinction between an unauthorised and illegal loan and also between directory and mandatory provisions with regard to borrowing or lending money, see *In re Coltman* (1881), 19 Ch. D., 64; *Landowners, &c., Co. v. Ashford* (1880), 16 Ch. D., 411, 436-439; *English, &c., Co. v. Rolt* (1881), 17 Ch. D., 715; *Murray v. Scott* (1884), 9 App. Cas., 519; *disting. Shaw v. Benson* (1893), 11 Q. B. D., 563.

Mortgage intended to secure the payment of money advanced.

Securing the payment of money advanced, &c — See p. 168,

ante. This seems only to be a mere paraphrase of money or money's worth. 44 & 45 Vict., c. 41, s. 2. Where a mortgage is given for a definite sum, the onus is on the mortgagee to establish that it was intended as a running security for the balance of an account. *Henniker v. Wigg* (1843), 4 Q. B., 792; *In re Boyes* (1870), 10 Eq., 467. Parol evidence is admissible in such cases. Thus in one case where property was mortgaged to a bank "as collateral and continuing security for my advances from them," parol evidence was admitted to show that the security included past as well as future advances. *Hibernian Bank v. Gilbert* (1887), 23 L. R., Ir., 321. If the intention can be clearly collected from the operative words, it is not to be defeated or controlled, because it goes beyond the recital. *Marcar v. Sigg* (1880), 2 Mad., 239, 256; *Australian, &c., Bank v. Bailey* (1899), A. C., 396. For the construction of a mortgage to secure debts due or growing due, see *Merchants' Bank of London v. Maud* (1870), 18 W. R., 312; 19 W. R., (Eng.) 657; *disting.* *City Bank v. Luckie* (1870), L. R., 5 Ch., 773. Where a policy was to be held as a security in case of death 'for any notes-of-hand or bills-of-exchange you may have cashed for me,' it was held that the words did not mean now but then, *i.e.*, at any time when the event might occur, and were wide enough to cover all notes and bills which the mortgagee had cashed for the mortgagor at his death; the court being guided to some extent by the subsequent dealings of the parties, showing that the policy was treated by them as a security for a floating balance. *Jones v. The Consolidated, &c., Co.*, (1858), 26 Beav., 256. But where a person gave a security for a present advance as well as for "any further sum or sums that you may advance or for which I may be liable to you," it was held that the mortgagee was not entitled to a charge for unsecured debts due to other persons which he had bought up. *Calisher v. Forbes* (1871), L. R., 7 Ch., 109. A security-bond executed in favour of the Registrar of the High Court by the appellants in a case before the Privy Council for the costs of the respondent was held to be a mortgage to secure a future debt. *Tokhan v. Girwar* (1905), 32 Cal., 494; 1 C. L. J., 118; 9 C. W. N., 372; *Nagaruru v. Tangalur* (1908), 31 Mad., 330. Cf. *Shyam v. Bappai* (1903), 30 Cal., 1060; 7 C. W. N. 914, where the security-bond was executed by a judgment-debtor for the due performance of any decree or order that might ultimately be passed by the appellate court. The owner of an estate may mortgage it not only for his own debt but for the debt of anybody else he pleases. Accordingly, where a mortgage was made to secure a present advance and also all other sums which should at any time be owing from the mortgagor, his executors, administrators or assigns on any account

Security for future debt.

whatsoever, it was held that the security included debts which were incurred by the mortgagor's widow who was a devisee for life of the mortgaged property, and had taken out letters of administration. *Ex re Watts* (1882), 22 Ch. D., 5. Where a mortgage was given to secure a certain sum to be advanced from time to time up to a certain date, and the mortgagor allowed a portion of the money to remain in the hands of the bankers in a deposit account in such a way that he could draw upon them and obtain the money at any time, it was held that the mortgage was intended to cover the whole of such sum, whether the money was advanced before that date or not. *Hariram v. Shendayul* (1888), 16 I. A., 12, 17; 11 All., 136, 142. When a mortgage contains a borrowing clause, it is not necessary that any subsequent advance by the mortgagee to the mortgagor shall be distinctly and expressly referred to the borrowing clause. The presumption appears to be that the advance is made on the security of the mortgage. *Cairncross v. Bradley* (1821), 2 Dr. & War., 482. Where only a part of the consideration for a mortgage has been paid, the mortgage is a good security for the amount paid. *Rajai v. Pandla* (1911) 35 Mad. 114; 21 M. L. J., 169; *Rashik v. Ram* (1912), 34 All. 273. See also cases cited in note 1, p. 277 ante. *Of. Rajani v. Gaur* (1908), 35 Cal. 1051; *Srinivasaswami v. Athmarama* (1908), 32 Mad. 281.

Engagement which may give rise to a pecuniary liability.—See *Nait Ram v. Sib Dal* (1882), 5 All., 238.

Admissibility of oral evidence to prove that the consideration was different from that stated in the mortgage-deed.—See *Hakamchand v. Hirulal* (1876), 3 Bom., 159; cf. *Indarjit v. Lal Chand* (1895), 18 All., 168.

Mortgagor.—This definition seems to be unnecessarily narrow. *Cf.* section 2 (vi), Conveyancing Act, 1881. "Mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property." And see *Teevan v. Smith* (1882), 20 Ch. D., 724. *Cf. Annaji v. Hapuchand* (1883), 7 Bom., 520, decided under Act XVII of 1879.

Mortgagee.—In the Conveyancing Act, 1881, section 2 (vi), "mortgagee includes any person from time to time deriving title under the original mortgagee."

Mortgage-money.—This definition is open to the objection that it does not include pecuniary liabilities other than debts. Mortgage-money would not also apparently include interest payable as damages where there is no contract to pay *post diem* interest. See the cases cited in note 3, p. 503, ante. Where a mortgage-deed provided that

Mortgage for future advance.

Mortgage-money and principal money defined.

Mortgage-money.

the mortgagor will pay the fixed amount of interest for six months from its date, and that if the interest was not paid on the due date the mortgagor should at once put the mortgagee in possession of the mortgaged property, it was held that the whole of the interest due to the mortgagee was also a charge on the property along with the principal amount. *Nand v. Ramdyal* (1904), 1 A. L. J., 470. It may be here noticed that the word 'mortgage-money' seems to be inaccurately used in this very section (see the definition of usufructuary mortgage) as well as in clause (h), section 76, for principal money.

Principal money.—See the cases cited in note 2, p. 501, *ante*.

Simple mortgage.

Definition of a simple mortgage.—See the cases cited in notes 2 and 3, p. 76, *ante*; see also *Khubchand v. Kaliandas* (1876), 1 All., 240, 244; *Phul Koer v. Muralidhar* (1879), 2 All., 527. Where a mortgage-bond which purported to be a simple mortgage, provided that "if the whole or a portion of the interest remains unpaid by the due date, the mortgagee shall take possession of the mortgaged properties immediately thereafter and enjoy the said properties as under an usufructuary mortgage," it was held that the mortgagee could obtain a decree for sale as a simple mortgagee. *Lingam Krishna v. Pusapati* (1911), 15 C. W. N. 441; 13 C. L. J., 584. See also *Hari v. Prema* (1901), 2 P. L. R., 596. For a security on the border line between a simple mortgage and a mortgage by conditional sale, see *Gokulchoss v. Kriparam* (1873), 13 B. L. R., 205. For the distinction between a simple mortgage and a charge, see pp. 103, 104, *ante*; see also the notes to sec. 100, *post*. As to the personal liability of the mortgagor, see pp. 76—80, *ante*, and notes to sec. 68, *post*. For a case where a simple mortgage was to be converted into an usufructuary one, if not redeemed within a fixed period, see *Mohan v. Mukim* (1901), 2 P. L. R., 672.

Mortgage by conditional sale.

Definition of a mortgage by conditional sale.—See pp. 80, 81, *ante*. This form of mortgage does not imply a covenant to pay. In other respects it is analogous to an English mortgage. It is known in Bengal as *kathobala* or *byebikwaja*, in Madras as *mudilatakriyam*, in Malabar as *peruartham*, and in Bombay as *Gahan lahan*. *Dhristi-bandak* is also a familiar name for a mortgage of tangible property under which the mortgagor remains in possession till the stipulated time arrives. *Strange*, Vol. I, p. 288, Vol. II, pp. 455—457. See also *Mayne's Hindu Law*, § 390. For cases in which the mortgagor has been made personally liable for the repayment of the loan, see *Nilamber v. Fateh* (1869), 12 W. R., 222; *Annasacasami v. Narraiyan*, (1862), 1 Mad. H. C., 114.

Definition of an usufructuary mortgage.—See pp. 92—100, *ante*, and *Jawahir v. Sameshwar* (1905), 33 I. A., 42; 28 All., 225. A

deed which reserves to the mortgagor the right to redeem upon payment of the mortgage-money either before or after the stipulated term and which provides that in the event of dispossession the mortgagee may bring a suit and realise the mortgage-debt with interest from the mortgagor and his property is an usufructuary mortgage. *Azimdad v. Ghansam* (1904) 1 A. L. J., 20. An usufructuary mortgage should be distinguished from a lease, though the distinction is sometimes very thin. Roughly speaking, if a lease is granted with the object of giving security for a debt, the transaction will be a mortgage, otherwise not. See *Kongatti v. Sulramanian* (1898) 9 M. L. J., 290; see also *Nago v. Damodar* (1888), Bom. P. J., 96; *Gorindrao v. Anaji* (1891), Bom. P. J. 241. Where by a deed headed "Lease in respect of Valatdan" the owner of the property delivered possession to another in consideration of money advanced for a fixed period, the transaction was held to be a mortgage. *Mahmad Muse v. Bagas* (1908), 32 Bom., 569. Disting. *Tuka v. Ganu* (1887), Bom. P. J., 317, where it was held that if a debtor makes over land to be enjoyed by his creditor for a term of years in satisfaction of the debt, the transaction will not be regarded as a mortgage. See also *Perlathail v. Mankude* (1881) 4 Mad., 113; *Teppayya v. Venkata* (1882), 6 Mad., 74; cf. *Gunnoo v. Bhooa* (1868) 5 Wym., 333; *Reference under Stamp Act, sec. 46* (1883), 7 Mad., 203; disting. *Bunscedhur v. Nundolall*, S. D., (1859), 1076. In *Chennapatnam v. Tadakamalla* (1903), 27 Mad., 86, it was held having regard to the circumstances relating to the simultaneous execution of a hypothecation bond and a lease, that it was intended to relieve the obligors from any responsibility in respect of interest, and to entitle the obligee to look for the liquidation of interest solely to the source pointed out. Where a mortgage-deed provided that the mortgagee should take possession of the mortgaged property and out of the rents and profits pay the Government revenue and appropriate a certain sum for interest at a certain rate, and it was further provided that should the amount of profits be found insufficient to cover the whole amount payable for interest, the deficiency would be made good by the mortgagor, it was held that the deficiency in the stipulated interest was realisable as well from the mortgaged property as from the mortgagor personally. *Chintaman v. Dulari* (1910), 33 All., 107. For an instance of an usufructuary mortgage with a covenant to pay, see *Parashram v. Pultajira* (1909), 34 Bom., 128.

Distinction between usufructuary mortgage and lease.

Personal liability of mortgagor.

In a case where the tenant of a non-transferable holding executed an usufructuary mortgage of it, placed the mortgagee in possession and abandoned the village the landlord was held to be entitled to eject the mortgagee as a trespasser. *Rasik v. Bidhumukhi* (1906), 33 Cal. 1094; 4 C. L. J., 306. Considered as a transfer.

Definition of an English mortgage.—See pp. 80, 101, *ante*. If the debt is not repayable on a *certain date*, the mortgage will not be an English mortgage. The time specified for payment is usually six calendar months from the date of the deed; though it is seldom intended, that the principal is to be paid on the day named in the condition.

Mortgages distinguished from conditional sales.

English mortgages and mortgages by conditional sale how distinguished from conditional sales.—An English mortgage as well as a mortgage by conditional sale must be distinguished from a sale with a condition for repurchase. Compare *Bhagwan v. Bhagwan* (1890), 17 I. A., 98; 12 All., 387; *Subhabhat v. Vasudevabhat* (1877), 2 Bom., 113; *Bhan v. Sidu* (1883), Bom. P. J., 258; *Vasudev v. Bhan* (1896), 21 Bom. 528; *Vishram v. Keshavarao* (1896), Bom. P. J., 81; *Situl v. Luchmi* (1883), 10 I. A., 129; 10 Cal., 30; *Ayyanayyan v. Rahimansa* (1890), 14 Mad., 170; *Lakshmi v. Srikrishna* (1871), 7 Mad. H. C., 6; *Ram Din v. Rang Lal* (1895), 17 All., 451; *Abdulbhai v. Kasi* (1887), 11 Bom., 462; *Govinda v. Jesu* (1878), 7 Bom., 73; *Bapu v. Bhavani* (1896), 22 Bom., 245; *Kinuram v. Nitye* (1907) 11 C. W. N., 400; 6 C. L. J., 208; *Ghadam v. Niaz-un-nissa* (1910), 33 All., 337; *Jhanda v. Wahid-ud-din* (1911), 33 All., 585; with *Balkissen v. Legge* (1897); 27 I. A., 58; 19 All., 434; 22 All., 149; *Ramayya v. Krishnamma* (1899) 23 Mad., 114; 9 M. L. J., 361; *Ranchod v. Bhikabhai* (1896), 21 Bom., 704; *Kalka v. Rhuviyan* (1906), 31 All., 300; *Wajid v. Shafakat* (1910) 33 All., 122; see also *Asopal v. Sheodarsan* (1868) 3 Agra, 205; *Badri v. Daulat* (1881), 3 All., 707. And see the question discussed pp. 82-90, *ante*. For English and Irish cases see p. 88, *ante*, and compare *Waters v. Mynn*, (1850), 14 Jur., 341; *Gordon v. Selby* (1837), 11 Bligh, n. s., 351; *Manlove v. Bale* (1688), 2 Vern., 84; *England v. Codrington* (1758), 1 Eden., 169; *Willis v. Latham* (1834), Ll. & G. (t. Plunkett), 69; *Willett v. Winnell* (1687), 1 Vern., 488; *Stokes v. Verrier* (1677), 3 Swanst., 634; *Ogden v. Battams* (1855), 1 Jur. (n.s.), 791; *Douglas v. Culverwell* (1861), 3 Giffard, 251; *Thornborough v. Baker* (1675), 3 Swanston, 628, 631; with *Gossip v. Wright* (1869), 21 L. T., 271, *O'Reilly v. O'Donoghue* (1845), Ir. R., 10 Eq., 73; *Ponsford v. Hankey* (1861), 7 Jur. (n.s.) 938; *Barrell v. Sabine* (1684), 1 Vern., 268; *Tasburgh v. Echlin* (1733) 2 Bro. P. C., 265; *Secretary of State for India v. British, &c., Co.*, (1892), 67 L. T., 434. The question whether a document operates as a mortgage, or as a conditional sale must be determined on a consideration of the whole document. The mere description of the document as "*Meddattu Krayam*" is not conclusive. *Kola v. Vuppala* (1906), 29 Mad., 531. A stipulation that the purchase-money being repaid with interest at a certain rate with-

The whole document must be considered.

in a fixed period the property shall be reconveyed is not conclusive that the transaction is not an absolute sale but a mortgage. *Modhu v. Rhidoy* (1901), 6 C. W. N., 192. Parol evidence of intention is not admissible for the purpose of ascertaining the nature of the transaction. *Balkishen v. Legge* (1899), 27 I. A., 58, 65; 22 All., 149, 158, 159; *Mahomed v. Nazar* (1901), 28 Cal., 289; *Sangira v. Ramappa* (1909), 34 Bom., 59; *Dagdu v. Nana* (1910), 35 Bom., 93; *Somana v. Gadigeya* (1910), 35 Bom., 231; *disting. Jafar v. Ranjit* (1898), 21 All., 4. But parol evidence of acts and conduct would seem to be admissible for the purpose of shewing that a transaction which is on the face of it a sale was intended as a security. See note B at the end of Lect. V., see also *Hashu v. Jesha* (1878), Bom. P. J., 24; *Mahomed v. Nazar*, *supra*; *Abdur v. Hafez* (1900), 5 C. W. N., 351; 25 Cal., 256; *Krishna v. Rama* (1906), 8 Bom., L. R., 764; cf. *Maung Kyin v. Ma Shwe La* (1911), 38 I. A., 146; 38 Cal., 892; 15 C. W. N., 958, in which the question as to the admissibility of extrinsic evidence was not decided. A contemporaneous unregistered document is, however, not admissible to show that a registered deed of sale was really intended to operate as a mortgage. *Mutha Venkhtachej lapatti v. Pyanda* (1903), 27 Mad., 348; but if at the time of the execution of a document a representation is made that the document though in form a deed of sale will not be enforced as against the executant as a sale and on faith of that representation the document is executed, the deed cannot be upheld as a deed of sale. *Navalbai v. Simbar* (1906), 8 Bom., L. R., 761, cf. *Abdullah v. Basharat* (1912), 35 All., 48; 17 C. W. N., 233.

Whether parol evidence admissible.

Distinction between the different kinds of mortgage.—

In a simple mortgage the borrower only parts with the right of sale. *Gopal v. Parushotam* (1882), 5 All., 121, 139; *Sheoratan v. Mohipal* (1884), 7 All., 258, 271; *Shridhar v. Atmaram* (1883), 7 Bom., 455, 458. In an usufructuary mortgage, he parts with the right of possession. *Sheoratan v. Mohipal*, *supra*; see also *Mahdo v. Harti* (1894), 16 All., 337. In an English mortgage as well as a mortgage by conditional sale the debtor professes to part with the property itself; but what is really transferred is only an interest in the property. See the definition of mortgage, *supra*. The sale by a mortgagor of the equity of redemption therefore, has no analogy whatever to the assignment of a mortgagee's interest and is not a sale of an actionable claim. *Tota Ram v. Lala* (1896), 20 All., 468. But though a mortgage, whatever may be its description, only transfers an interest in the mortgaged property, faith in mere forms has not altogether died away. Thus, a simple mortgagee could not make any application under sec. 310A. of the Code of Civil Procedure, 1882. *Nitya v. Hiralal* (1900).

Distinction between the different kinds of mortgage.

5 C. W. N., 63. But a mortgagee by conditional-sale could certainly do so. *Hamidal Huq v. Matangini* (1898), 2 C. W. N., celviii. The rule has been altered in the Civil Procedure Code, 1908, O. 21, r. 89; cf. *Rakhal v. Dwarka* (1886), 13 Cal., 346; see also *Gobind v. Knight* (1881), 7 Cal., 372; in which it is stated that where legal and equitable estates are recognized, the mortgagee should be considered as the sole owner of the property subject to the equity of redemption.

Mortgage
when to be
by assurance.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument¹ signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, [Rangoon, Moulmein, Bassein and Akyab],² by delivery to a creditor or his agent of documents of title to immovable property, with intent to create a security thereon.

As to limitation to the territorial operation of section 59, see section 1, *supra*; section 59 extends to every cantonment in British India. See Act XV of 1910, section 29.

Requisite of
a valid
mortgage.

Registered instrument.—Where the transaction is merely in the nature of a preliminary contract, it does not fall under this section. *Appasami v. Manikam* (1885), 9 Mad., 103; *Currie v. Chetty* (1869), 3 B. L. R., a.c., 126; 11 W. R., 520; cf. *Vani v. Bani* (1895), 20 Bom., 553; *Patel v. Bhikabhai* (1906), 21 Bom., 704; *disting. Neve v. Pennell* (1863), 2 H. & M., 170; *Krishna v. Raman* (1897), 20 Mad., 484. It will be noticed that like many other sections in the chapter, this section applies only to a mortgage to secure the repayment of a loan. Debentures are excepted from registration under section 17 of the Registration Act, but, *quære*,

¹ Substituted for "an instrument" by Act VI of 1904, s. 3, which came into force on the 11th of March,

1904.

² Substituted for "and Rangoon" by Act VI of 1904, s. 4.

whether a mortgage of debentures should not be registered under this section? Cf. *Driver v. Broad* (1893), 1 Q. B., 539. As to the effect of possession for more than 12 years, as an usufructuary mortgagee under an unregistered instrument, see *Budankayala v. Vinayaka* (1902), 26 Mad., 72; 12 M. L. J., 410.

Signed by the mortgager.—See the authorities cited at p. 147, note 4, *ante*. As to whether a deed has been properly executed when a person signed his name on a blank sheet of paper and gave authority to the mortgagee to engross on the paper a mortgage-deed, see *Yule v. Ramkhehwan* (1901), 6 C. W. N., 329. What constitutes signature.

Attested by at least two witnesses.—See the cases cited in note 4, p. 147, *ante*. Though a mortgage-bond must be attested by at least two witnesses its execution may be proved by only one attesting witness. *Nand Kishore v. Kanee* (1902) 29 Cal. 355; 6 C. W. N., 395.

A party executing a document cannot be an attesting witness as regards the execution of it by others. *Peary Mohan v. Sreenath* (1908), 14 C. W. N., 1046; *Debendra v. Behari* (1912), 16 C. W. N., 1075; so where a document is jointly executed by more than one person, each executant cannot be treated as an attesting witness as regards the execution by the others. *Sarur Jigar v. Barada* (1910), 37 Cal., 526; 11 C. L. J., 563; 14 C. W. N., 974. A person interested in the money advanced under a mortgage but who is not himself a party to the deed can, however validly attest the deed. *Balu v. Gopal* (1911), 13 Bom. L. R. 944. Who may be attesting witnesses.

As to attestation in case of execution by *purdanashins* from behind a *pundah*, see *Harmongal v. Ganuar* (1907), 13 C. W. N., 40; *Isri v. Gunga* (1909), 14 C. W. N., 165; *Sarur Jigar v. Barada*, *supra*.

An attesting witness is a witness who has seen the deed executed and who signs it as a witness. The signature of the writer and of the sub-registrar to a mortgage-deed under section 63A of the Dekkhan Agriculturists' Relief Act, 1879, cannot be treated as proper attestation under this section. *Ranu v. Laxmanrao* (1908), 33 Bom., 44; 10 Bom. L. R., 943. Attestation by witnesses on the acknowledgment by the mortgagor of his signature is not a compliance with the provisions of this section. *Shamu v. Abdul* (1908), 31 Mad., 215; *Affid. on app.* by Privy Council which overruled the decision of the Allahabad High Court to the contrary. 39 I. A. 218; 35 Mad. 607; 16 C. W. N., 1009. What is proper attestation.

The fact that a son of a deceased mortgagor attested the bond does not render him liable as if he were one of the mortgagors. *Bhagawat v. Suba* (1905), 7 C. L. J., 195.

For the distinction between a deed and an escrow, see p. 150*n*; see also *Mohsun v. Balasoo* (1863), 2 Hay., 576. And on the effect of an alteration made in a deed, see the cases cited at p. 151, *ante*.

Invalidity of an instrument of mortgage not duly attested.—See in addition to the cases cited at pp. 147, 148, *ante*, *Gobinda v. Dwarka* (1908), 35 Cal. 837, 844; *Samoo v. Abdul* (1908), 31 Mad., 337, where it was held that such instruments do not operate to create a charge under section 100; *Debendra v. Behari*, *supra*; cf. *Mithirani v. Somanatha* (1901), 24 Mad., 397; but see *Nellakantam v. Madasami* (1903), 17 M. L. J., 39. But a personal covenant is not rendered void, and the document is admissible to prove such covenant. *Kerr v. Ruxton* (1906), 4 C. L. J., 510; *Sada v. Tadepally* (1906), 30 Mad., 284; *Pulaka v. Thiruthipalli* (1908), 32 Mad., 410, overruling *Madras Deposit, &c., Society v. Oonnamali* (1895), 18 Mad., 29. In England though an invalid mortgage may sometimes be enforced as a charge in equity (see p. 148, note 3, *ante*), yet where the conveyance is not perfected with the solemnities positively required by an Act of Parliament, as in the case of Ship Registry Acts, equity cannot relieve, as it would be against the policy of the Acts. Sugden's Vendors and Purchasers, p. 746, citing *Speldt v. Lechmere* (1807), 13 Ves., 588; *Exp. Yallop* (1808), 15 Ves., 60; *Exp. Wright* (1812), 1 Ro., 308; cf. *Inmadipattam v. Periya* (1900), 28 I. A., 46; 24 Mad., 377; 5 C. W. N., 217. The rule deducible from the cases is that if the purpose of an Act is one of public concern, its provisions will be regarded as mandatory; if not, their effect will be controlled by the purpose of the Act. *Jortin v. The South-Eastern Railway* (1854), 6 DeG. M. & G., 270. And for the distinction between directory and mandatory provisions generally, see *Landowners, &c., Insurance Co. v. Ashford* (1880), 16 Ch. D., 411, 438. It should be here noticed that where a Statute merely imposes a penalty, the court cannot inflict a forfeiture of the security, if it is not expressly provided for by the Statute. *Wright v. Horton* (1887), 12 App. Cas., 371.

Personal covenant may be proved.

Nothing in this section &c.—See pp. 151—164, *ante*. For the previous state of the law, see pp. 152, 153, *ante*; cf. *Woozeer v. Luckee* (1864), 1 W. R., 143; *Pearee v. Gobind* (1868), 10 W. R., 56. The situation of the property is immaterial. Questions relating to the validity of a mortgage by deposit of title-deeds are decided in England not by the law of the *situs*, but by the law of the place where the contract is made. *Ex parte Pollard* (1840), Mont. & Ch., 239; 4 Deac., 27; *Watson v. Chapman* (1868), 18 L. T., N. S., 705; *Ex parte Holthausen* (1874), L. R., 9 Ch., 722; *British South Africa Co. v. DeBeers, &c.* (1910), 1 Ch., 354, 357; overruled on another point *DeBeers &c. v. British &c. Co.* (1912), A. C. 52. This is the principle which underlies this section of the Act

Mortgage by deposit of title-deeds.

which allows a charge to be created on lands outside the towns named in the section, if only the delivery of the title-deeds takes place at some one or other of the places mentioned in it. *Mudhadas v. Ramkissen* (1892), 14 All., 238; *Srinath v. Godadhar* (1897), 24 Cal., 348; 1 C. W. N., 225. See also *Varden Seth Sam v. Luckpathy* (1862), 9 M. 1 A., 307; *Manekji v. Rustomji* (1889), 14 Bom., 269; *Matigara Cool Co. v. Shragers* (1911), 38 Cal. 824, where one of the defendants who made the deposit was alleged to have no interest in the properties covered by the deeds deposited. For the rule in America see Pingrey, §§ 276, 277. The Town of Bombay includes the whole island subject to the original jurisdiction of the High Court. *Trimbak v. Bhagwandas* (1898), 23 Bom., 348. But Calcutta does not include the added area, *Biraj v. Gopaswar* (1899), 27 Cal., 202.

Mortgage by deposit of title-deeds.—Where there is a debt whether pre-existent or newly created, if the title-deeds of the debtor are handed over to the creditor, the court infers that the object of the dealing was to create a mortgage; the onus being cast upon the debtor of displacing that inference, and showing that it was not intended that there should be a mortgage. *Bulfin v. Dunne* (1861), 12 Ir. Ch., 69; cf. *Powell, Ex parte* (1842), 6 Jur., 490. But there must be some evidence to connect the debt with the possession of the deeds. See p. 157, *ante*. As to what deeds should be delivered and the effect of deposit of title-deeds partly with one and partly with another creditor, see pp. 158, 159 *ante*. Where the deeds have been abstracted by the mortgagor and cannot be distinguished from his other deeds, the mortgagee may claim a general lien on all the deeds of the mortgagor. *Mason v. Morley* (1865), 34 Beav., 475. For the effect of misrepresentation by borrower of lands to which the deeds relate, see p. 159 *ante*.

Deposit does not operate as a pledge of the deeds.—In an equitable mortgage by deposit, the deeds themselves are not pledged to the creditor. They are held by the mortgagee merely as incident to the charge on the land. *In re Richardson* (1885), 30 Ch. D., 396. But if the person who deposits the deeds has no title to the property, the creditor if he advanced his money *bonâ fide* on the security of the estate may, it has been said, retain possession of the deeds even against the true owner, at any rate where the depositor was in possession of the property or where it is an incorporeal hereditament not admitting of actual occupation. *Joyce v. De Moleyns* (1845), 8 Ir. Eq., 215; cf. *Walwyn v. Lee* (1803), 9 Ves., 24; but see *Spackman v. Foster* (1883), 11 Q. B. D., 99.

What are title-deeds.—An equitable mortgage of lands may be created in England in the case of copy-holds, by a deposit of copies

Delivery to be made in a town named.

Mortgage by deposit. Some evidence necessary.

Does not amount to pledge of the deeds.

What are title-deeds.

of the court rolls ; but not by a deposit of an attested copy of a deed. *Exp. Broadbent* (1834), 1 Mont. & A., 635 ; 4 Dea. & C., 3. Cf. *Warner, Exp.* (1812), 19 Ves., 202. It has also been held that an equitable mortgage may be created by the deposit of a receipt for the purchase-money which contains the terms of the agreement for sale, if there are no title-deeds or conveyance in the possession of the depositor. *Goodwin v. Waghorn* (1835), 4 L. J. (N.S.) Ch., 172. It may be noticed that in the English law a deposit of documents of title to personal property, for instance, certificates of shares, policies of insurance, &c., will give the creditor a charge in the same way as a deposit of title-deeds, &c., in the case of land. *Ferris v. Mullins* (1854), 2 Smale & Giff., 378 ; *Ex parte Ridge* (1842), 2 Mont. D. & D., 544 ; *Ex parte Moss* (1849), 3 DeG. & Sm., 599 ; *Exp. Stewart* (1865), 34 L. J. Bk., 6 ; but see *Exp. Boulton* (1857), 1 DeG. & J., 163.

Documents of title to personal property.

What is a sufficient delivery.—There must be an actual deposit of the title-deeds either with the creditor or his agent ; see p. 158, *ante*. Whether the title-deeds should not be deposited with the direct object of giving an immediate security and not *diverso intuitu*, see p. 160, *ante*. It is, however, clear that if the deeds are delivered by mistake, there will be no equitable mortgage. *Wardle v. Oakley* (1864), 36 Beav., 27. Cf. *Lucas v. Dorrien* (1817), 7 Taunt., 278. In case of a conditional deposit if the condition is not fulfilled no charge will attach. *Burton v. Gray* (1873), L. R., 8 Ch., 932.

What constitutes sufficient delivery.

What property and interests are included in a mortgage by deposit.—See *Pryce v. Bury* (1853), 2 Drew., 11 ; *Glynn, Exp.* (1840), 9 L. J. Bk., 41 ; *Leathes, Ex parte* (1829), 3 Deac. & C., 112. Cf. *Hunt, Ex parte* (1841), 1 Mont. D & D., 139 ; *Jones v. Williams*, (1857), 24 Beav., 47 ; *Turner v. Letts* (1855), 20 Beav., 185 ; *Edwards, Ex parte* (1827), 1 Deac., 611. An equitable mortgage will operate not only on the interest of the debtor at the time of the deposit, but also on any interest which he may afterwards acquire ; see p. 283, *ante* ; see also *Exp. Bisdee* (1840), 1 M. D. & DeG., 333 ; *Exp. Farley* (1840), *id.*, 683 ; *Chissum v. Dewes* (1828), 5 Russ., 29, a case of good-will ; cf. *Feelor v. Philpot* (1823), 12 Price, 197, where the lease was renewed. And see *Unity, &c., Association v. King* (1858), 25 Beav., 72, where a deposit of deeds by a person who had only a lien on the property was treated as creating a charge as against such lien. An equitable mortgage will include fixtures whether erected before or after the deposit. It is true it was held in one case that a deposit of the title-deeds of lease-holds by way of security, without any memorandum, gives the deposittee no interest in tenant's fixtures. *In re Trethowan* (1877), 5 Ch. D., 559, 567. But this ruling is opposed to a long string of cases. See *Ex parte Broadwood* (1840), 1 Mont. D. & D., 631 ; *Ex parte Bentley*.

What interests are included in mortgage by deposit.

(1840), 2 Mont. D. & D., 591; *Ex parte Barclay* (1855), 5 D. M. & G., 403; *Ex parte Astbury*, (1869), L. R., 4 Ch., 630; *Meux v. Jacobs* (1875), L. R., 7 H. L., 481; *Williams v. Evans* (1856), 23 Beav., 239; *Re Lusty* (1891), 60 L. J., 160; *Cowell, Ex parte* (1848), 17 L. J. Bk., 16; *Tagart, Ex parte* (1847), 1 DeG., 531; *Price, Ex parte, In re* (1842), 11 L. J. Bk., 27.

For what debts an equitable mortgage will be a valid security.—Where a debtor deposited his title-deeds with his creditor until such time as his account should not exceed £100, at which time they were to be restored to him, and the debtor died indebted to the creditor in £274; it was held that the creditor's lien extended to the whole £274. *Ashton v. Dalton* (1846), 2 Coll., 565. An equitable mortgage will hold good only to the extent of valid consideration therefor. *James v. Byder* (1841), 4 Beav., 600.

Antecedent debts will not be included in the absence of any expression of a contrary intention. See p. 160, *ante*. A mortgage by deposit will, however, cover subsequent advances by parol agreement. See p. 159, *ante*. But where the deposit is accompanied by a written memorandum, evidence of a contemporaneous oral agreement will not be admitted. See p. 153, *ante*; *disting. Nettleship, Exp.* (1841), 2 Mont. D. & D., 124; *Milton v. Edgworth* (1802), 5 Bro. P. C., 313.

Remedy of mortgagee.—In Calcutta as well as in Madras it has been the practice to decree a sale on an equitable mortgage; but in Bombay an equitable mortgagee is allowed to foreclose the security. See pp. 270, 271, *ante*. See also *Marcar v. Sigg* (1880), 2 Mad., 239, 263; *Kushal v. Punamchand* (1897), 22 Bom., 164, 167. Cf. *Parbhut'g v. Bholanath* (1839), 1 Fulton, 368. Whether a deposit of title-deeds in the English law without more amounts to an agreement to execute a legal mortgage and therefore carries with it all the remedies incident to such a mortgage seems to be doubtful. *Carter v. Wake* (1877), 4 Ch. D., 605. But the mortgagor is certainly bound to do all that is necessary to vest the estate in the mortgagee and must pay for the expense of effecting such transfer. *Pryce v. Bury* (1853), 2 Drew., 41; 16 Eq., 153 (n). Cf. *James v. James* (1873), 16 Eq., 153; *Backhouse v. Charlton* (1878), 8 Ch. D., 444; *York Union, &c. v. Astley* (1879), 11 Ch. D., 205; *Lees v. Fisher* (1882), 22 Ch. D., 283. For recent cases under the Conveyancing Act, 1881, section 25, see *Oldham v. Stringer* (1885), 51 L. T., 895; *Green v. Biggs* (1885), 52 L. T., 630. It may here be noticed that the doctrine that an equitable mortgagee by deposit of title-deeds is entitled to foreclosure does not extend to a pledge of personal chattels. *Carter v. Wake* (1877), 4 Ch. D., 605.

Remedy of mortgagee.

Pledge of personal chattels.

Bona fide purchaser for value.

Equitable mortgage how far enforceable against a purchaser for value and without notice.—See *Dayal v. Jibraj* (1875), 1 Bom., 237. In *Cogan v. Pogose* (1884), 11 Cal., 158, priority seems to have been claimed only under the Registration Act; while in *Gokul Dass v. Eastern, &c., Co.* (1905), 33 Cal., 410, it was held that there being no such distinction in India between legal and equitable estates as is known to the English law, the claim of a subsequent mortgagee under a registered mortgage to priority could only, if at all, be sustained under the Registration Act and that such a mortgagee although without notice was not entitled to priority; cf. *Re Burke* (1872), 9 L. R. Ir., 211. See also *Re Driscoll's Estate* (1866), 1 Ir. R., Eq., 285; *Reilly v. Garnett* (1856), 7 Ir. R., Eq., 1; *Re Stephens' Estate* (1859), 10 Ir. R., Eq., 282; distinguishing *Lambert Estate* (1883), 11 L. R., Ir., 534; *Agra Bank v. Barry* (1874), 7 L. R. H. L., 135.

Security not extinguished if mortgagee parts with the deeds or loses them without negligence.—*Adsetts v. Hives* (1863), 33 Beav., 52; distinguishing *Driscoll, In re* (1852), Ir., 1 Eq., 285; *Boden, Ex parte* (1841), 10 L. J. Bk., 16; *Baskett v. Skeel* (1863), 11 W. R. (Eng.), 1019.

Person with partial interest when may deposit.

Equitable mortgage by trustee or executor having beneficial interest.—See *Smith, Ex parte, Hildyard, In re* (1842), 11 L. J. Bk., 16. An executor having a beneficial interest may make a deposit without the concurrence of his co-executors; *Ex parte Sheffield, &c.*, (1865), 13 L. T. (N.S.), 477. **By tenant for life or a tenant-in-common.** See *William v. Medlicot* (1819), 6 Price, 495; *Turner v. Letts* (1855), 20 Beav., 185; *Burgess v. Moxon* (1856), 2 Jur. (N.S.), 1059. **By executor of land purchased with the produce of personal estate.** See *Ball v. Harris* (1839), 3 Jur., 140.

Right of equitable mortgagee to take the rents and profits.—An equitable mortgagee is not entitled in England to the rents prior to the date of the order for sale. *Bignold, Ex parte* (1835), 4 L. J. Bk., 58; distinguishing *Garry v. Sharratt* (1830), 10 B. & C., 716.

Deposit with a firm.

Re-deposit where unnecessary.—A mortgage by deposit with a firm may be extended to future members by parol agreement. *Kensington, Ex parte* (1813), 2 V. & B., 79, 83; cf. *Ex parte Oakes* (1841), 2 Mont. D. & DeG., 234; *Smith, Re Gye* (1841), *ibid*, 314; *Re O'Brien* (1841), 11 L. R., Ir., 263; distinguishing *Whitbread, Exp.* (1812), 19 Ves., 209. It has also been held in England that acquiescence in a deposit by the former owner may be equivalent to a re-deposit by the new owner. *In re Wyn Hall, &c., Co.* (1870), L. R., 10 Eq., 515, 520.

Equitable sub-mortgage.—A sub-mortgage of an equitable security may be created without a deposit of the memorandum

given with the original security. *Exp. Smith* (1842), 2 M. D. & DeG., 587.

Specific performance.—The mortgagee is entitled to receive a memorandum signed by the debtor specifying the terms on which the deposit was made. *Sporle v. Whayman* (1855), 20 Beav., 607. Specific performance.

Whether memorandum accompanying deposit should be registered. See pp. 153—156, *ante*. Cf. section 7, Yorkshire Registries Act, 1884.

Equitable mortgage how discharged.—In the absence of consent, an equitable charge can only be displaced by actual payment of the amount secured or a deposit under section 83 of the Act. See *Bank, &c., Wales v. O'Connor* (1889), 14 App. Cas., 273.

Rights and Liabilities of Mortgagor.

60. At any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver the mortgage-deed, if any, to the mortgagor, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished : Right of mortgagor to redeem.

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed

for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption
of portion of
mortgaged
property.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

At any time.—In the case of an usufructuary mortgage the season at which the mortgagor may redeem is generally fixed by the deed with reference to the agricultural conditions of the country; and in such cases the mortgagor would not be allowed to redeem at any other time of the year. *Bansi v. Girdhar* (1894), 14 A. W. N., 143.

When mort-
gage may

When principal money becomes payable.—In addition to cases cited at pp. 229—231, *ante*, see *Ramchandra v. Kondaji* (1896), 22 Bom. 221; and cases cited therein. Cf. *Purna v. Peary* (1912), 39 Cal. 828. Ordinarily a mortgagor cannot take proceedings to redeem a mortgage before the time limited for payment to the mortgagee expires. *Husaini v. Husain* (1907), 29 All., 471; 4 A. L. J., 375. But see *Radha Krishna v. Madhava* (1906), 17 M. L. J., 83. When the mortgage-deed does not prescribe any period the mortgage is liable to be redeemed or foreclosed at any time after the date of the bond. *Tipparapur v. Andugula* (1907), 17 M. L. J., 177. For cases under the Dekkhan Agriculturists' Relief Act (XVII of 1879), allowing the mortgagor to bring a suit for redemption even before the expiry of the term fixed by the deed, see *Tukaram v. Ramchand* (1901), 26 Bom., 252; *Mahmad v. Bagas* (1908), 32 Bom., 569; 10 Bom. L. R., 742. See also p. 231, *ante*. Where mortgagor will be admitted to redeem before the day of payment in the deed, see pp. 227, 230, *ante*; see also *Burnomoyee v. Benode* (1873), 20 W. R., 387. A mortgagee who has demanded payment of his mortgage-debt or taken steps to compel payment cannot refuse a tender of the debt by the mortgagor. See p. 230, *ante*. But a mortgagee in possession for a term cannot be redeemed before the full term has expired, merely because the whole amount of the advance was not paid to the mortgagor. *Mun v. Shiva* (1866), 1 Agra, 91. This section in terms applies only to a mortgage to secure a debt.

The mortgagor has a right on payment or tender, &c.—

In a suit for redemption a plaintiff has to prove the existence of a subsisting mortgage which he is entitled to redeem. *Musafir v. Lagan* (1904), 2 A. L. J., 62. Where the consideration for an assignment by a mortgagor of property which is the subject of certain prior incumbrances is partly the undertaking by the assignee to redeem the prior mortgages and partly the payment of cash, the assignee is entitled to sue for redemption of the mortgages, notwithstanding that there may be a failure of consideration as to the cash payment. *Mangab v. Kadir* (1902), 13 M. L. J., 1. See pp. 614, 615, *ante*. It has been held that payment to one of several joint mortgagees is a good discharge against all. But the proposition seems to be doubtful. See pp. 452—454 *ante*. See also *Hossainara v. Rahim-unnessa* (1910), 38 Cal., 342; 13 C. L. J., 3, where it was said that a payment to one of two joint mortgagees does not necessarily operate as a discharge of the debt in so far as the other mortgagee is concerned. Cf. *Ramasami v. Muniyandi* (1910), 20 M. L. J., 709; *Ibrahim v. Rama* (1911), 21 M. L. J., 508. A mortgagee cannot be compelled to part with his security till he has received his money, and a refusal by a mortgagee to accept a proper tender is not a breach of the mortgage contract for which an action will lie. *Bank of New South Wales v. O'Connor* (1889), 14 App. Cas., 273. Cf. *Postlethwaite v. Blythe* (1818), 2 Sw., 256. And see section 83, *post*. The case of a pledgee is different, for he has only a special property. For the conditions of a valid tender, see pp. 232—236, *ante*. See also *Morley v. Bridges* (1846), 2 Coll. C. C., 621; and the cases collected in Ashburner's Mortgage, 622—625. Proper time and place. See Fisher, § 1504; cf. § 38, Contract Act. It was formerly the practice in England to specify the hour as well as the place for payment, as the money being a sum in gross, a tender on the land would not have been sufficient to save a forfeiture. Co. Litt., 2106; Litt., sections 340, 342; Litt., section 342. But the practice has been discontinued, because in the present state of the law, a strict compliance with the conditions for redemption is not necessary; nor is there any danger of the mortgagee's estate being defeated by a tender made in his absence as the shape of the proviso is that of a reconveyance and not of a condition for defeating the estate of the mortgagee. When a mortgage-debt has been contracted in a particular currency, it should be repaid in that currency. *Trimbak v. Sakharan* (1891), 16 Bom., 599. Amount to be tendered when mortgagor in possession as lessee.—See p. 523, *ante*.

Payment to one of several joint mortgagees.

Tender, when valid.

When interest ceases to run.—Though the mortgagee cannot be compelled to take payment of interest for less than the stipulated time, yet if he himself puts an end to the security by realization or if

Cessation of interest.

Cessation of interest.

by reason of the intervention of a third party the mortgagor's property is realized, from the moment the principal money gets into the pocket of the lender, interest ought to stop. *West v. Diprose* (1900), 1 Ch., 337. Where a mortgagor desiring to redeem agreed to pay three months' interest but the mortgagee was unable to produce the title-deeds, it was held that interest must stop at the end of three months. *James v. Rumsey*, (1879), 11 Ch. D., 398. Interest ceases to run from the date of tender. *Velayudu v. Hyder* (1909), 33 Mad., 100; *Rourke v. Robinson* (1911), 1 Ch., 480; cf. *Webb v. Crosse* (1912) 1 Ch. 323. See also section 84, *post*.

Form of retransfer.—(1) Where a person has a partial interest; see *Pearce v. Morris* (1869), L. R., 5 Ch., 227; *Colyer v. Colyer* (1863), 3 DeG. J. S., 676. (2) Where all persons interested in the equity of redemption concur;—see *Hartley v. Burton* (1868), L. R., 3 Ch., 365.

Acknowledgment in writing.—See *Uppalakandi v. Kunnam* (1890), 19 Mad., 288; cf. sub-sections (1) (c) and (2) (xi), section 17 of the Registration Act.

Delivery of mortgage-deed.

Delivery of the mortgage-deed.—It may be noticed that the section only requires the delivery of the mortgage-deed but not of the title-deeds in the possession or power of the mortgagee. But see Code of Civil Procedure, O. 34, rr. 2, and 7, *post*, which recognises the right of the mortgagor to have back from the mortgagee his deeds on payment of principal, interest, and costs. And this right will prevail against the solicitor's lien claimed in right of the mortgagee. *In re Llewellyn* (1891), 3 Ch., 145. Cf. *Wakefield v. Newbon* (1844), 6 Q. B., 276. For cases in which the mortgagor may be called on to execute a covenant to produce the mortgage-deed, the costs of preparing and settling it being borne by the mortgagee's estate, see *Capper v. Terrington* (1844), 1 Coll., 103.

Reconveyance of mortgaged property.

Retransfer of the mortgaged property.—See pp. 252, 314, *ante*. Where a mortgagor gave notice to the mortgagee that he would attend for the purpose of getting a reconveyance with the title-deeds and made a tender of the amount due on the mortgage and the mortgagee refused to hand over an indorsed reconveyance with the title-deeds, and an action for redemption was subsequently brought by the mortgagor, the court refused to allow the mortgagee interest and costs subsequent to the date of the tender and ordered him to pay the costs of the action. *Rourke v. Robinson* (1911), 1 Ch., 480. The mortgagor cannot require the mortgagee to assign the mortgage debt and premises to his nominee; cf. *Ponnammal v. Kalithiha* (1910), 34 Mad., 115; *Colyer v. Colyer* (1863), 3 DeG. J. S., 676. In England there was formerly no other obligation on a mortgagee than to reconvey from which it followed :—(1) that a puisne mortgagee

could not adversely redeem a first mortgagee in the absence of the mortgagee who was entitled to a reconveyance of the estate on payment by him to the puisne mortgagee; see p. 241, *ante*: cf. *Fell v. Brown* (1787), 2 Bro. C. C., 276; (2) that a second mortgagee, under a covenant not to sue the mortgagor for a certain time, could not during that time compulsorily redeem the first mortgagee. For the law in England now, see section 15, Conveyancing Act, 1881, and section 12, Conveyancing Act, 1882: and compare *Teerin v. Smith* (1882), 20 Ch. D., 724, with *Alderson v. Elgey* (1884), 26 Ch. D., 567. A distinction must be drawn between transferring a mortgage and concurring with the mortgagor in conveying the mortgaged property freed from the mortgage. The latter may not be done to the detriment of puisne incumbrancers, of whose charges the mortgagee has notice. See p. 538, *ante*. *Quære*. Is the first mortgagee bound to convey the mortgaged estate to the second mortgagee on payment of the mortgage-debt without the concurrence of the mortgagor? See *Smith v. Green* (1844), 1 Coll. C. C., 555. See also *Squire v. Pardoe* (1892), 66 L. T., 243.

Reconveyance of mortgaged property.

Mortgagor not bound to redeem.—It has been held in England that as a mortgagor is not bound to take a retransfer, he is not liable to indemnify the mortgagee against debts incurred by the latter before the mortgage-debt is paid off. But if the mortgagor elects to take a retransfer, the mortgagee can claim to be indemnified against all expenses and liabilities which have been incurred by him in maintaining the mortgaged property. See p. 558, *ante*. Cf. *Mulla Vithil v. Korambath* (1911), 21 M. L. J., 213.

No obligation on mortgagor to redeem.

Payment under protest.—If mortgagee makes unfounded claims and refuses to reconvey unless they are paid, and the mortgagor pays under protest, he can maintain a suit for repayment. *Chapple v. Mahon* (1842), 1r. R., 5 Eq., 225.

Authority of agent to receive payment.—See p. 451, *ante*. See also *Burrough v. Cranston* (1838), 2 Ir. Eq. R., 203; *Exp. Swinbanks* (1879), 11 Ch. D., 525; *Viney v. Chaplin* (1858), 2 DeG. & J., 468; *disting. Barker v. Greenwood* (1837), 2 Y. & C., Ex., 414; *Gordon v. James* (1885), 30 Ch. D., 249.

Mortgaged property must be restored in its integrity.—See pp. 252, 253, 314 *ante*. See also the cases on the doctrine of clogging the equity of redemption discussed, pp. 207—227, *ante*. See also *Shankar v. Gokul* (1912), 17 C. W. N. 1. As to a covenant giving the mortgagee a right of pre-emption in respect of the mortgaged property, see pp. 224, 225, *ante*. As to whether a right of pre-emption can be pleaded as a bar to a right of redemption, see *Kadakamvalli v. Mekkath* (1907), 30 Mad., 388. Cf. *Gopalar*

Restoration of mortgaged property.

Clogging the equity of redemption.

v. Kunhan (1907), 30 Mad., 300. See also *Chapple v. Mahon* (1843), Ir. R., 5 Eq., 225; *Edwards, In re* (1861), 11 Ir. Ch. R., 367. For the most recent discussion on the subject of clogging the equity of redemption, see *De Beers &c. v. British &c. co.* (1912), A. C. 52, overruling *British South Africa Co. v. De Beers, &c.* (1910), 2 Ch. 502, where the rule was applied to a contract for an issue of debentures to secure a loan. In *Morgan v. Jeffreys* (1910), 1 Ch., 620, a proviso against redemption for twenty-eight years, even if it might be supported in a case where there was a similar provision against calling in the mortgage, was held to exceed all reasonable limits and so could not be enforced. Cf. *Ram v. Jagrup* (1912), 10 A. L. J. 157; see p. 226 *ante*. A covenant in an instrument described as an *Ubayapattom* or *Kanom* mortgage, being both in essence and in form nothing more than a security for a debt, to renew perpetually is inoperative, being a clog on the right of redemption. *Neelakandhan v. Anantha* (1906), 30 Mad., 61. See also the remarks on the subject in 16 L. Q. R., 322. As to the validity of an agreement that the mortgagor shall not redeem the mortgage on payment only of the money due on foot of his security without also discharging other debts due from him to the mortgagee, see pp. 225, 226, 404, 405, *ante*. Cf. *Ranjit v. Ramdhan* (1909), 31 All., 482; 6 A. L. J., 654; *Bhikham v. Shankar* (1909), 6 A. L. J., 255; *Brij Lal v. Bhawani* (1910), 32 All., 651; 7 A. L. J., 821. See also notes under section 61, *infra*. In Bombay, leases made by mortgagors to mortgagees are regarded with the greatest distrust. See pp. 228, 229, *ante*; cf. *Dada v. Dhondo* (1887), Bom. P. J., 12; *Narsing v. Narayan* (1890), Bom. P. J., 211; *Gobindrao v. Anaji* (1891), Bom. P. J., 241.

Condition in restraint in the mortgage-deed.

Condition in restraint of redemption.—A stipulation in a mortgage-deed that the mortgaged property shall be redeemed only on the demand of the mortgagee will not be enforced; cf. *Narayan v. Rowji* (1884), Bom. P. J., 254; *Sari v. Motiram* (1896), Bom. P. J., 420, where it was held that the mortgagor's right to redeem cannot be postponed beyond the time when the mortgagee can call in his money. Of course a covenant in a mortgage not to redeem at all is absolutely void. *East India Co. v. Atkyns* (1683), 1 Comyn., 348.

How right is extinguished.

Extinction of equity of redemption.—The equity of redemption may of course be extinguished by the act of the parties and a conveyance or surrender of the equity of redemption by the mortgagor will not be set aside simply on the ground of a misconception on the part of the mortgagor of his rights under the law. *Vishnu v. Kashi* (1886), 11 Bom., 174. See the subject discussed, pp. 228, *et seq.*, *ante*. The relation between the mortgagor and mortgagee is not so far analogous to that between a trustee and *cestui que trust*,

as to preclude a purchase of the equity of redemption by the mortgagee. The courts, however, will look upon the transaction with jealousy if called upon to scrutinise it. *Mir Eusuff v. Panchanan* (1910), 11 C. L. J., 639. Mere admissions by a mortgagor or an understanding between him and the mortgagee that the mortgagee has become the owner cannot destroy the equity of redemption, but this rule has no application where there has been a transaction of purchase by the mortgagee subsequent to, separate from and independent of the mortgage. *Hanmanta v. Gopal* (1909), 11 Bom., L. R., 1145. No possession short of the statutory period of 60 years nor any acquiescence of the mortgagors not amounting to a release of the equity of redemption would be a bar or defence to a suit for redemption; nor would a sale of the equity of redemption in *inritum* affect persons who were not parties to the proceedings or properly represented on the record. *Khiarajmal v. Daim* (1904), 32 I. A., 23; 32 Cal., 296. As to extinction of the equity of redemption by order of court, see O. 34, r. 3 and r. 8, Civil Procedure Code. See also *Chaudhri Ahmed v. Seth Raghubar* (1905), 32 I. A., 229; 28 All., 1, where owing to the *vis major* of the mutiny, the decree for redemption could not be enforced and a fresh suit was held to be necessary in order to give effect to the rights of the parties.

What amounts to release.

Mortgagee entitled to reasonable notice when.—See p. 230, *ante*. See also *Johnson v. Evans* (1889), 61 L. T., 18. The drafting of this clause is not very artistic, but the meaning is sufficiently clear.

Redemption by a person interested in a share only of the mortgaged property.—See pp. 245—252, *ante*. The proviso to the section only deals with one specific class of cases. Although the mortgage-security is entire and indivisible, and the general rule is that a mortgagee cannot be required at the instance of a purchaser of a part of the mortgaged premises to apportion his mortgage-debt, an apportionment will be directed in exceptional cases, for instance, where it is necessary for the benefit of one who has taken a part of the property under necessity or where by the conduct of the mortgagee there has been a break-up of the entire security. *Debendra v. Mirza Abdul* (1909), 10 C. L. J., 150. See also *Mir Eusuff v. Panchanan* (1910), 11 C. L. J., 639. *Wajahat v. Ratan* (1911) 8 A. L. J. 1092. *Bunsee v. Gena* (1911), 14 C. L. J. 530. *Jugal v. Kedar* (1912), 34 All. 606. But the integrity of the mortgage is not absolutely broken up so as to enable the owners of the equity of redemption in the residue to redeem their shares piecemeal. See, p. 252, *ante*; but see *Hamida v. Ahmed* (1909), 31 All., 335; 6 A. L. J., 387. Where after an usufructuary mortgage of *sir* lands the mortgagee had purchased the proprietary rights in the mortgaged property, the mortgagor becoming an ex-proprie-

Redemption by part-owner.

When integrity of mortgage broken up.

Right of redemption of a portion.

tary tenant, the mortgagee was not permitted to cast the whole burden of the debt upon the ex-proprietary rights, he having himself broken up the integrity of his security. *Chunni v. Sikishan* (1911), 33 All., 434. Where the integrity of a mortgage has been broken up upon the purchase by the mortgagee of the share of one of his mortgagors, the right of redemption of each of the other mortgagors is limited to his share of the property; *Munshi v. Daulat* (1906), 29 All., 262; and the mortgagee is bound to give credit only for that which his vendor would have been liable to pay and not the full value of the share purchased. *Mutty v. Nanda* (1908), 12 C. W. N., 745; 8 C. L. J., 92. But the rule that a mortgagee may not be paid off piecemeal is also subject to other exceptions. See pp. 243—245, *ante*. Thus where there is a clear expression of intention that the mortgagors shall have distinct interests in the mortgage, or where the mortgagee has already allowed a partial redemption, the rule will not apply. See p. 244, *ante*. So where the mortgagee had transferred a portion of the mortgaged property and the right of the mortgagor to recover possession of that portion was barred by limitation, the mortgagor was allowed to redeem the portion in the possession of the mortgagee on payment of a rateable portion of the mortgage-debt. *Husaini v. Husain* (1907), 29 All., 471. For an instance where redemption of a share was allowed, the defendant having refused to accept the offer to redeem the whole, see *Jawahir v. Baldeo* (1907), 6 C. L. J., 672; 12 C. W. N., 515; 10 O. C., 193. It has been held in Bombay that this section is an enabling enactment and does not compel a person to redeem his share only. *Savalram v. Ramchandra* (1896), Bom., P. J., 623. This, however, seems to be rather doubtful law. Be this as it may, a part-owner of the equity of redemption can redeem the whole estate, if the mortgagee does not object, and must do so if the mortgagee insists upon the payment of the entire debt. *Chaudhuri Ahmed v. Seth Raghubar* (1905), 32, I. A., 229; 28 All., 1, at p. 17; *Yesu v. Kashiram* (1890), Bom., P. J., 65.

Right to redeem one of two properties separately mortgaged.

51. A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

Illustration.

A, the owner of farms *Z* and *Y*, mortgages *Z* to *B* for Rs. 1,000, *A* afterwards mortgages *Y* to *B* for Rs. 1,000, making no stipulation as to any

overruling *Clapham v. Andrews* (1884), 27 Ch. D., 679. Under this section it is not clear whether in case of an express contract all the rules relating to consolidation of mortgages in the English law would apply. See pp. 403—405, *ante*. Cf. *Sundar v. Bholu* (1898), 18 A. W. N., 58.

There must be mortgages of different properties.

This section has reference to mortgages upon different properties and not to a case where the same property is the subject of both mortgages. *Bhartu v. Dalip* (1906), 3 A. L. J., 672; see also *Salmon, In re* (1903), 1 K. B., 147.

This section implies that if there are different mortgages in favour of the same person of the same property the mortgagor cannot seek to redeem any one mortgage without redeeming the other mortgages also. *Balasubramania v. Sivaguru* (1909), 21 M. L. J., 562; *Dorasami v. Venkata* (1901), 25 Mad., 108 at p. 115; and where the mortgagor had expressly stipulated that he would not be entitled to redeem without paying off other debts due from him to the mortgagee and charged on the property covered by the mortgage, he would not be permitted to redeem without paying off such other debts as well as the amount due on foot of his mortgage. *Ranjit v. Ramdhan* (1909), 31 All., 482; 6 A. L. J., 654; *Bhikham v. Shankar* (1909), 6 A. L. J., 255; *Brijlal v. Bhawani* (1910), 32 All., 651; 7 A. L. J., 821; See also notes under sec. 60 *ante*.

For the civil law on the subject, see Kelleher, p. 177.

Right of usufructuary mortgagor to recover possession.

62. In the case of an usufructuary mortgage, the mortgagor has a right to recover possession of the property—

- (a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;
- (b) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money,—when the term (if any), prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court as hereinafter provided.

Recovery of possession of mortgaged property.—See pp. 231, 232, *ante*. Cf. *Kundan v. Thakurlal* (1897), 6 C. P. L. R., 43; *Kalu v. Lalji* (1899), 11 C. P. L. R., 103. This section should be read with sec. 60; but *quære*, whether a suit under it should be treated as an action to redeem or as an action of ejectment? See *Yates v. Hambly* (1742), 2 Atk., 360, 362. The onus lies on the plaintiff to show that the mortgagee in possession has been paid in full by receipt of the profits. See p. 611, *ante*. For the old practice in such cases, see *Kullyan v. Sheo Nundun* (1872), 18 W. R., 65; *Perlad v. Broughton* (1873), 24 W. R., 275; *disting.* *Boistub v. Huro* (1871), 17 W. R., 408. But see *Azimut v. Jowahir* (1870), 13 M. I. A., 404; and the other cases collected in Macpherson's Mortgage, 400-403.

Clause (a).—This clause relates to a mortgage when the debt and interest subsist and are to be satisfied out of the usufruct, the term of the mortgage determining on such satisfaction. *Reference under Stamp Act*, 1879 (1883), 7 Mad., 203, 206. The mortgagor will be entitled to credit for the amount of unpaid *hugazari*. See p. 568, *ante*; cf. *Roufun v. Mazum*, S. D. (1850), 205.

Clause (b).—It may be noticed that the words "or deposits it in court." &c., are either superfluous or should have been also inserted in sec. 60. An usufructuary mortgagee will not be precluded from claiming interest after the expiration of the term for which the mortgage was executed. *Ahsan v. Moorad*, S. D., N.-W. P. (1864), 518. For the practice while the usury laws were in force, see *Hunnoman v. Eeshree*, S. D., N.-W. P. (1844), 13; *Unroodh v. Dunner*, S. D., N.-W. P. (1845), 390; *Ramdass v. Byopershad*, S. D., N.-W. P. (1850), 456. It may be noticed that this section does not apply where the rents are to be appropriated partly in lieu of interest and partly in payment of the principal money.

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession

Recovery of possession by usufructuary mortgagor.

Accession to mortgaged property.

Accession acquired in virtue of transferred ownership.

must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

Accession to
mortgaged
property.

Accession to mortgaged property.—See pp. 254, 255, *ante*. The section apparently makes no distinction in favour of acquisitions made by a mortgagee in possession, without availing himself of his rights as such, though it has been suggested that the mortgagor cannot claim any acquisition made by the mortgagee as a matter of right, except in the cases contemplated by sec. 90 of the Indian Trusts Act. Shepherd and Brown, page 276. The mortgagor, however, is clearly not bound to take the accession. But if he does take it, he must pay the expense of acquiring it, unless separate possession of such accession is not possible and the acquisition was neither necessary for the preservation of the mortgaged property nor made with the assent of the mortgagor. Thus, where a mortgagee in possession planted a grove without the consent of the mortgagor, which was not necessary for the preservation of the property and of which separate possession was not possible, it was held that the mortgagor was entitled to possession of the grove unconditionally. *Zubeda v. Sheocharan* (1899), 22 All., 83. But it seems that if the mortgagee of a share in a joint estate plants trees, the right to them would vest not in the mortgagor exclusively but in all the co-parceners. *Bahadoor v. Koramull* (1866), 1 Agra, 281.

Accession
must be claim-
ed in redemp-
tion-suit.

The mortgagor upon redemption, &c.—The accretions should be claimed when the mortgagor seeks to redeem, and if he omits to do so, he may be precluded from bringing a fresh suit. *Bakshiram v.*

Darku (1873), 10 Bom. H. C., a. c., 369. Disting. *Ketki v. Dinabandhu* (1909), 10 C. L. J. 83, where the mortgagee acquired the property treated as accretion after redemption.

Acquisition necessary to preserve the property, &c.—See pp. 254, 255, 544 *ante*, see also sec. 72, *post*. Cf. *Rahmatullah v. Yusuf* (1912), 10 A. L. J. 124.

Or made with his assent.—Improvements may be allowed for, though the mortgagor gave no actual consent, if he did not object while the works were in progress. *Gansham v. Budha* (No. 119 of 1876 Civil), Punjab Digest, Column 362; cf. *Maniram v. Bapu*, Bom. P. J. (1881), p. 267. Disting. *Sammo v. Abdul*, (1883) 3 A. W. N., 208. See the question discussed, pp. 550-556, *ante*.

Benefit of improvements on sale of mortgaged property—For the right of the mortgagee to claim upon a sale the benefit of an increase in the value of the mortgaged premises owing to improvements made by him, see pp. 551, 552, *ante*.

64. Where the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease. Renewal of mortgaged lease.

Cf. III. (d), sec. 3, Specific Relief Act.

This section deals only with one kind of accessions and lays down a more stringent rule than sec. 90 of the Indian Trusts Act, or that which obtains in the English law, according to which the renewed lease enures to the benefit of the mortgagor, only where the mortgagee obtains the renewal behind the back of the mortgagor, or where there is a tenant right of renewal. See pp. 256-258, *ante*; cf. *Taster v. Marriott* (1768), Amb., 668; *Owen v. Williams* (1773), Amb., 734; *Rushworth's case* (1670), Freem, 12; disting. *Fitzgerald v. Rainsford* (1804), 1 Ba. & Be., 37, note. The mortgagor, of course, cannot have the benefit of the new lease without paying the money spent by the mortgagee in the renewal, which the latter may add to his security. Cf. sec. 72. The renewal of the lease or the making of a new settlement in the names of nominees of the mortgagee cannot alter the real title to the lands. *Khizarajmal v. Daim* (1904), 32 I. A., 23; 32 Cal., 296. Where Inam lands were confiscated while an usufructuary mortgagee was in possession who continued in possession on payment of the assessment on the lands, the mortgagors were held entitled to redeem the mortgage. *Gurbasappa v. Rango* (1912), 14 Bom. L. R. 563. Renewal of lease of mortgaged property.

It should be noticed that leases for terms of years determinable or not determinable with lives which may be renewed periodically on payment of fines or other conditions are unknown in this country, and even in England ecclesiastical and collegiate bodies have now almost wholly ceased to grant such leases.

Implied con-
tracts by
mortgagor.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

- (a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same ;
- (b) that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto ;
- (c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property ;
- (d) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage ; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by

reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts ;

(e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

Nothing in clause (c), or in clause (d), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

That the interest which the mortgagor professes to transfer, &c.—Cf. section 7 (C) of the Conveyancing Act, 1881. See also p. 254, *ante*. For the remedy of the mortgagee if the covenant is broken, see the notes to section 68, *post*. It may be here noticed that a covenant for further assurance will not, in the absence of anything to show the contrary, extend to enlarging the estate conveyed or to barring an interest in other persons than the grantor. *Davis v. Tolle-mache* (1856), 2 Jur. (N. S.), 1181 ; disting. *Bankes v. Small* (1887), 34 Ch. D., 415, *affd.*, 35 W. R. (Eng.), 765 ; see also Sugden, p. 468. A legal mortgagee of leaseholds is entitled in England to the custody of the lease. *Stokes v. Stokes*, W. N. (1886), 184. Similarly a legal mortgagee of a freehold estate is entitled to the title-deeds ; and the mortgagee cannot be deprived of the right by a deposit of them by the mortgagor with his solicitor with a view to create a lien. *Smith v. Chichester* (1840), 4 Ir. Eq., 580. Covenant for title.

That the mortgagor will defend, &c.—See p. 254, *ante*. It will be noticed that this clause, while opening out a wide field for litigation does not give the mortgagee any additional security, as he can sue the mortgagor for the mortgage-money under section 68, whenever he is wrongfully deprived of his security. For quiet enjoyment.

For payment
of public
charges, &c.

That the mortgagor will so long as the mortgagee is not in possession, &c.—This clause, unlike the next, does not imply any undertaking by the mortgagor that all public charges down to the commencement of the mortgage have been paid. It will also be noticed that public charges have not been defined in the Act. But they will undoubtedly include land-revenue and perhaps also cesses. Cf. section 76, clause (c). It would seem that the covenant of the mortgagor will come to an end, if the equity of redemption is transferred to a third person. *Balkrishna v. Vishvanath* (1894), 19 Bom., 528. The implied covenant on the part of the mortgagor, it has also been held, does not extend to the purchaser of the equity of redemption from the mortgagor, and there is no obligation on him to pay the public charges accruing due in respect of what he has purchased. *Renga v. Gnanaprakasa* (1906), 30 Mad., 67.

For validity of
lease, &c.

Where the mortgaged property is a lease for a term of years, &c.—In this country, the mortgagee of a leasehold interest does not make himself liable to perform the covenants in the lease by simply accepting a mortgage of such interest. In England, where the law is otherwise, a mortgage of a leasehold generally takes the form not of an assignment of the whole term, but only of an under-lease. See p. 313, *ante*, and *Macnaghten v. Mewa* (1878), 3 C. L. R., 285. Cf. section 7 (D) Conveyancing Act, 1881, the language of which, like that of this clause, is appropriate only to a mortgage by assignment, and not to one by way of demise. The wording of the clause would also exclude mortgages of permanent tenures, the incidents of which will probably be regulated by the general rules of equity and good conscience. Where leasehold property is mortgaged, notice of the incumbrance should be given to the lessor as the mortgagee might in the absence of such notice run the risk of losing his security. *Galbraith v. Cooper* (1860), 8 H. L. Cas., 315; see also Chapter XIV, Bengal Tenancy Act.

Consequence
of breach of
covenant.

Where the mortgage is a second or subsequent incumbrance, &c.—It has been said that a breach of the covenant, specified in clause (e), would give the mortgagee an immediate right to recover the mortgage-money personally from the mortgagor. *Singjee v. Tiruvengadam* (1889), 13 Mad., 192. But this seems to be somewhat doubtful, unless the mortgagee has been deprived of his security through the default of the mortgagor. It is surmised that only actual damages will be recoverable on a breach of the implied covenant, and nothing more. It may be noticed that the proviso in the penultimate paragraph of the section is not only out of place but absolutely inconsistent with the context. Under the provisions of this section a puisne mortgagee who has obtained a decree for sale after redemption of prior

incumbrances and who has redeemed the prior incumbrances, is entitled to a decree under O. 34, r. 6 of the Code of Civil Procedure, which corresponds to the repealed section 90 of the Act, in respect of the deficit due upon the prior incumbrances as well as in respect of the deficit due upon his own mortgage. *Ali Jan v. Mariam* (1903), 26 All., 93.

The benefit of the contracts mentioned in this section shall be annexed, &c.—The last paragraph only lays down the rule that the benefit of the covenants specified in the section will run with the land. Cf. section 7 (f), cl. 6 of the Conveyancing Act, 1881, where the words ‘in whom that estate or interest, &c.,’ it has been said, mean in whom any part of the property is vested, for the whole estate or interest, in that part, of the implied covenantee. *Hood and Challis*, p. 35. For a recent case in which it was held that the benefit of the covenant ran with the business and was not limited to the original firm of mortgagees, see *John Brothers, &c., Co. v. Holms* (1900), 1 Ch., 188. It should be noticed that as against an assignee, no plea can prevail which is only in the nature of a personal bar to the original covenantee. A covenant therefore which runs with the land may be invoked by a *bonâ fide* purchaser against a breach, though traceable to fraud on the part of the original covenantee. As pointed out by Bowen, L. J., the benefit of the covenants runs with the land ; but the burden of the fraud does not. *David v. Sabine* (1893), 1 Ch., 523, 541.

Covenant to run with the land.

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate ; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Waste by mortgagor in possession.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Destructive or permanently injurious thereto.—See pp. 204, 205, *ante* ; cf. *Usborne v. Usborne* (1660), Dick., 75. See also *Blaney v. Mahon* (1681), 2 Eq. Cas., Abr., 16, which points out when a mortgagor may be restrained from opening and working mines. If

Restraint of waste by mortgagor in possession.

Where injunction granted.

the court is satisfied that the security is insufficient, it will interfere to prevent waste by injunction at the instance of the mortgagee, and this may be done even after a decree for foreclosure. Thus in *Goodman v. Kine* (1845), 8 Beav., 379, where after a decree in a foreclosure-suit, a mortgagor in possession began to commit waste, he was restrained by injunction, though no injunction was prayed for by the bill. Underwood is regarded only as a crop, and an injunction will not be allowed to restrain the mortgagor from cutting it, even where the mortgagor is in prison for debt and the security is scanty, as it would amount to turning him out of possession. *Humphreys v. Harrison* (1820), 1 J. & W., 581. But if the mortgagor is a bankrupt, and there is no one to exercise control over the property, as for instance, where no assignee has been appointed, it seems an injunction will not be refused. *Hampton v. Hodges* (1803), 8 Ves., 105, and see the reporter's note. The right to claim an injunction belongs only to the mortgagee and may not be asserted by a mortgagor, who has conveyed the equity of redemption without taking from the purchaser any security as an indemnity against his bond on the ground that the land may not be sufficient to satisfy the mortgage. Kerr on Injunctions, p. 82, citing *Brumley v. Fanning*, 1 Johns. Ch. (Amer.), 500. An occupancy-tenant who has made an usufructuary mortgage of his holding and put the mortgagee in possession cannot during the subsistence of such mortgage relinquish his holding to the prejudice of the mortgagee. *Chhote Lal v. Sheopal* (1910), 33 All., 335.

Measure of damages in case of waste.

Damages recoverable by mortgagee for waste.—See pp. 204, 280, 319, *ante*. In America the rule is settled that a mortgagee can only recover the amount by which his security is impaired, not, however, exceeding the amount of the injury; whether the action is against a stranger or the mortgagor or his assignee. In Massachusetts, however, the mortgagee may recover the whole loss. This rule may perhaps be supported on technical grounds where the action is by a first mortgagee against a stranger; but can hardly be defended when it is carried to the extent of allowing a mortgagee of the equity of redemption to recover the whole amount of the loss even against the mortgagor and his assignee. Sedgwick on Damages, section 73. As to a mortgagee's right of suit for damages against a co-tenant of his mortgagor for cutting down and appropriating the trees on the mortgaged property, see *Aiyappa v. Kuppusami* (1904), 28 Mad., 208.

Insufficient security.—See pp. 204, 205, *ante*. Cf. clause (c), section 20, Act II of 1882. In England the old distinction between land and houses, which has been reproduced in the explanation to this

section, has been abrogated by the Trustee Act, 1888, the two-thirds rule being now equally applicable to both descriptions of property.

Rights and Liabilities of Mortgagee.

67. In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold. Right to
foreclosure
or sale.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

- (a) to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale; or
- (b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or
- (c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or
- (d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the

mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

Rights of mortgagees.

After the mortgage-money has become payable.—See pp. 264-268, *ante*. Where a mortgage contains a covenant not to redeem for a fixed period, the mortgagee cannot foreclose before the expiration of the term. *In re Hone's Estate* (1870), 1r. R., 8 Eq., 65. The principal money becomes payable only when the payment becomes obligatory upon the mortgagor. *Deraam v. Ford* (1900), 1 Ch., 142; and see in addition to the cases cited, pp. 264-268, *ante*; *Yeo v. Abu* (1900), 27 I. A., 98; 27 Cal., 938. For a case in which a question arose whether the execution of a deed was not a condition precedent to the right of the mortgagee to realise his security, see *Subrahmania v. Krishna Ayyan* (1899), 23 Mad., 137; 9 M. L. J., 368.

Demand when necessary.

Demand when necessary.—See p. 265, *ante*. See also *Netta v. Kumara* (1897), 22 Mad., 20; *Hanmant v. Bowles* (1884), 8 Bom., 561; *disting. Perumal v. Alagiri* (1896), 20 Mad., 245; cf. *Ram Chunder v. Hemangini* (1878), 4 Cal., 283; 3 C. L. R., 336. It should be noticed that where there is a condition for payment of a sum at a time and place certain, the condition is not broken by non-payment at the time unless the demand for payment is made at the specified place. *Thorn v. City Rice, &c.* (1889), 40 Ch. D., 357. Cf. *Tewkesbury Gas Co., In re* (1911), 1 Ch., 279. When a simple mortgage does not prescribe any period within which the mortgage-money should be paid, the mortgage is liable to be redeemed or foreclosed at any time after the date of the bond. No demand is necessary before the institution of a suit for sale or foreclosure. *Tippurapur v. Andugula* (1907), 17 M. L. J., 177.

Right to realize mortgage to secure amount owing on account current.—See *Berry v. Halifax, &c., Co.* (1901), 1 Ch., 188; (1900), W. N., 262.

Right to realize debenture loans.—See p. 265, *ante*; see also *Wissner v. Levison and Steiner* (1900), W. N., 152; *Hooper v. Western, &c.* (1895), 68 L. T., 78.

Right to realize security, if interest is not punctually paid.—See pp. 266, 267, *ante*; see also *In re Prendergast* (1839), 2 Ir. Jur., 145.

When debt payable by instalments.

Right to realize mortgage securing payment by instalments or only portion of debt with provision that total sum shall be recoverable on any default.—See p. 452, *ante*. See also *Ford v. Chesterfield* (1854), 19 Beav., 428; *Wallingford v. Mutual Society* (1880), 5 App. Cas., 685; *Sterne v. Beck* (1863), 1 DeG. J. & S., 595; cf. *Cochrane, Ex parte* (1876), 48 L. J., Bk., 31, where the deed

provided that the whole sum would be due if the mortgagor should become a liquidating debtor or bankrupt; disting. *Carroll v. O'Connor* (1847), 11 Ir. Eq., 200, where the rights of third parties were concerned.

Right to realize security where a lender is constituted a trustee and receiver of the rents and profits.—See *Valia v. Vira* (1876), 1 Mad., 228.

Waiver of default by mortgagee.—See p. 266n., *ante*; cf. *Waiver of default by mortgagee*. *Stanhope v. Manners* (1760), 2 Eden, 197; disting. *In re Taaffe's Estate* (1864), 14 Ir. Ch., 347, where the court was also of opinion that, under the circumstances, there was no default in the payment of interest. The particular acts relied upon to establish a waiver should be distinctly alleged; general charges or averments not being enough. It should also be noticed that a party will not be bound to prove a formal tender, if it appears, that it would have been a mere form as the creditor would have refused to accept the money. *Hunter v. Daniel* (1845), 4 Hare, 420, 433.

Before a decree has been made for redemption.—This shows that the mere institution of an action for redemption will not operate as a bar to foreclosure.

Or the mortgage-money has been paid or deposited as hereinafter provided.—See secs. 83 and 84, *post*. It seems that the mortgagee's right will not be taken away, unless notice to him or knowledge on his part of the deposit is established. *Sitarama v. Venkatra* (1888), 11 Mad., 371. Dr. Stokes suggests that a tender should also be a complete answer to a suit for foreclosure or sale. Anglo-Indian Codes, Vol. 1, p. 780. But see *Bank of New South Wales v. O'Connor* (1889), 14 App. Cas., 273; *Satyabadi v. Harabati* (1907), 34 Cal., 223; *Rukhminibai v. Vankatesh* (1907), 31 Bom., 527; see however *Rugad v. Satnarain* (1904), 27 All., 178.

Joint mortgagees.—It has been held that one of two co-mortgagees can sue for recovery of his share of the mortgage-money impleading his co-mortgagee as defendant if he should be unwilling to join him as plaintiff. *Atchamma v. Subbarayudu* (1903), 15 M. L. J., 496.

Suit for foreclosure.—The power to foreclose attached by the law to a mortgage cannot be taken away merely by reason of a statutory provision that the mortgagee shall hold the security "for the purpose of re-imbursement only and not for profit." *Bank of New South Wales v. Campbell* (1886), 11 A. C., 192. It would seem that in England though a mortgage by way of trust for sale cannot be foreclosed, if the mortgagor brings an action for redemption which is dismissed, the dismissal will operate as a foreclosure. *In re Alison* (1879), 11 Ch D., 284, 293. For a case in which it was held that neither a

decree for foreclosure nor sale could be made, see *Stamford, &c. v. Ball* (1862), 4 DeG. F. & J., 310.

Remedies
of different
classes of
mortgages.

Nothing in this section shall be deemed to authorize a simple mortgagee as such, &c.—Where a simple mortgagee obtained possession of the mortgaged property instead of a judicial sale, it was held that the decree did not work foreclosure, and that the possession obtained thereunder was merely that of a mortgagee which involved liability to account and to be redeemed. *Papamma v. Vira Pratapa* (1896), 23 I. A., 32; 19 Mad., 249. A simple mortgagee is entitled to a decree for sale as a matter of course, notwithstanding that under the terms of the mortgage-bond he has the option on the mortgagor's default in payment of interest to take possession and to enjoy the profits as under an usufructuary mortgage. *Lingam Krishna v. Pusa-pati* (1911), 13 C. L. J. 584; 15 C. W. N., 441. But there can, of course, be no decree for sale where only the profits and not the land itself are pledged to the creditor. *Ganga v. Kusyari* (1878), 1 All., 611.

Remedies of
usufructuary
mortgagee.

An usufructuary mortgagee cannot as such bring a suit for foreclosure or sale. See pp. 93, 269, *ante*; cf. *Sadashiv v. Vyankatrao* (1895), 20 Bom., 296; *Tewaree v. Kassee* (1863), W. R., F. B., 79; *Gulam v. Mehtab* (No. 57 of 1873, Civil), Punjab Record; *Madho v. Debidyal* (1891), 11 A. W. N., 168. At any rate, the mortgagee cannot institute any such suit, if his possession has not been disturbed. See pp. 269, 270, *ante*; cf. *Umrao v. Collector of Moradabad*, N.-W. P., S. D. (1859), p. 13; *Ganesh v. Deedar*, 5 N.-W. P. (1873), 128. But a sale may be allowed, if the mortgage is not purely usufructuary. A deed of mortgage with possession providing that the mortgagee is to enjoy the profits in lieu of interest for ten years and is to be redeemed on the expiration of the term by payment of the mortgage-money creates a purely usufructuary mortgage. *Manilal v. Motibhai* (1911), 35 Bom., 288. And a mere provision in an usufructuary mortgage for redemption upon payment of the principal after the expiry of a certain term would not entitle the mortgagee to bring a suit for sale on such mortgage. *Khunni v. Madan* (1909), 31 All., 318. But where the mortgage-debt is made payable within a fixed period, the mortgage is not purely an usufructuary mortgage and an order for sale may be made after the debt has become payable. *Dattambhat v. Krishna* (1910), 34 Bom., 462; 12 Bom. L. R., 491; *disting.* *Krishna v. Hari* (1908), 10 Bom. L. R., 615; see also *Parasharam v. Pullaṣṭrao* (1909), 34 Bom., 128. For a somewhat peculiar case where an usufructuary mortgagee who had no right to sue for the mortgage-money, but had obtained a decree against the mortgagor on a claim independent of the mortgage and attached in

Where mort-
gage not pure-
ly usufruc-
tuary.

execution the interest of the mortgagor in the mortgaged properties, ^{When such mortgagee may sue for sale.} was held entitled to bring a suit for sale of the properties free from his mortgage under the provisions of the repealed section 99, and to have the proceeds of sale applied first to the discharge of all mortgages on the properties and then towards the satisfaction of his claim under the attachment, see *Gobinda v. Narain* (1906), 29 Mad., 424 ; 16 M. L. J., 285. An usufructuary mortgagee holding a subsequent simple mortgage on the same property may obtain a decree for sale under the latter mortgage either free of or subject to the usufructuary mortgage. *Rengasami v. Subbaraya* (1907), 30 Mad., 408 ; *Radhakrishna v. Muthu* (1908), 31 Mad., 530 ; 18 M. L. J., 564. But in a case in the Allahabad High Court the mortgagee was given a simple money-decree for the amount due under the usufructuary mortgage and a decree for sale on the simple mortgage. *Azimdad v. Ghansam* (1904), 1 A. L. J., 20. See also pp. 594, 595 *ante*. An usufructuary mortgagee is competent to sue for sale of the mortgaged property on failing to get possession, where there is a covenant that on such an event the mortgage-money could be recovered from the mortgaged property. *Narpat v. Ram* (1908), 30 All., 162 ; 5 A. L. J., 130 ; see pp. 94, 269, *ante* ; cf. *Jagul v. Ram* (1886), 6 A. W. N., 212 ; *Chandar v. Subhkaram* (1887), 7 A. W. N., 119 ; *Umrao v. Valiullah* (1888), 8 A. W. N., 171 ; *Ram v. Nohar* (1881), 1 A. W. N., 63, and the cases cited there ; and it has been held in some cases that unless the terms of the instrument excluded such a construction, the security should be presumed to be an ordinary mortgage entitling the lender to the usual remedies of a mortgagee. See p. 269, *ante* ; cf. *Jortin v. The South Eastern, &c., Co.* (1854), 6 DeG. M. & G. 270 ; *disting. Taylor v. Emerson* (1843), 6 Ir. Eq., 224 ; see also *Jafar v. Ranjit* (1898), 21 All., 4. It has been held by the Madras High Court that where a mortgage comprising several properties is usufructuary with regard to some and simple with regard to the rest, it is competent to the mortgagee to bring all the mortgaged properties to sale, and it is not open to him to split the mortgage and apply for the sale of the hypothecated properties alone. *Nanu v. Raman* (1892), 16 Mad., 335. It was also held in this case that an usufructuary mortgagee, who sues the mortgagor for the rent of the mortgaged premises, but is unable to obtain satisfaction, may bring a suit for interest against the mortgagor, including the amount which had been previously claimed by him as rent. For the right of a mortgagee to sue for sale under Bombay Regulation V of 1827, see *Sidheswar v. Babaji* (1899), 23 Bom., 781 ; *Parasharam v. Puttajirao* (1909), 34 Bom., 128 ; *disting. Sadashib v. Vyankatrao* (1895), 20 Bom., 296 ; *Yashvant v. Vithal* (1895), 21 Bom., 267. ^{Where mortgage not purely usufructuary.}

Mortgages holding several mortgages.

Where several mortgages.—See pp. 593-595, *ante*. When a mortgagee holds several mortgages on the same property a suit on the prior mortgages for sale of the property is maintainable if he does not in such suit pray for the sale of the property subject to the later mortgage which has not been sued upon. *Gobinda v. Harihar* (1910), 14 C. W. N., 1053; 13 C. L. J., 21. But it is not competent to a holder of two mortgages to maintain a suit for sale on the later mortgage of the property subject to the prior mortgage. *Keshavram v. Ranchhod* (1905), 7 Bom. L. R., 811. Nor can he sell the property for a prior mortgage subject to the puisne incumbrances. *Godh v. Sakla* (1907), 4 A. L. J., 253.

Remedies of sub-mortgagees.

Sub-mortgagee's remedies.—See p. 264, *ante*. A sub-mortgagee is entitled to bring a suit against his mortgagor and to realise his dues on his mortgage by sale or foreclosure. He may also frame his suit in such a way as to enforce the original mortgage against the mortgagor of his mortgagor. *Bansi v. Durga* (1909), 9 C. L. J., 429; *Zaki v. Deonath* (1909), 10 C. L. J., 470; *Alikjan v. Rambaran* (1910), 12 C. L. J., 357. A sub-mortgagee's rights cannot be affected by transactions between the original mortgagee and the mortgagor after notice of the sub-mortgage. *Narayana v. Raghavammal* (1907), 18 M. L. J., 462.

Remedies in particular

Clauses (b) and (c).—See pp. 271, 272, *ante*. Both these clauses are based on the practice of the English Court of Chancery. Clause (b) assumes that the rights of the parties are best worked out by a decree for sale, and not by a decree for foreclosure; while clause (c) is founded upon the inconvenience which would be suffered by the public generally, if undertakings of the character mentioned in it were liable to be foreclosed or sold. In such cases, the proper course for the mortgagee is to apply for the appointment of a receiver. Cf. *Marshall v. South, &c., Co.* (1895), 2 Ch., 36, overruling *Bartlett v. West, &c., Co.* (1893), 3 Ch., 437; (1894), 2 Ch., 286; see also *In re Herne, &c., Co.* (1878), 10 Ch. D., 42; *Pegge v. Neath, &c., Tramways Co.* (1895), 2 Ch., 508. But a receiver will not be appointed of a railway which has been commenced but not completed. *In re Knott End Railway* (1901), 2 Ch., 8; Cf. *In re Birmingham, &c., Co.* (1881), 18 Ch. D., 155.

A person interested in part only of the mortgage-money.—

It will be noticed that the exception in clause (d) does not cover all the cases which should have been provided for. See p. 276, *ante*. See also *Rashid-un-nissa v. Muhammad* (1912), 34 All., 474.

Right to sue for mortgage-money.

68. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only:—

(a) where the mortgagor binds himself to repay the same;

- (b) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor ;
- (c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section 66, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.

Right to sue the mortgagor for the mortgage-money.— Right to sue for the mortgage-money.

The section provides only for a personal remedy against the mortgagor and does not give the mortgagee the right to sue for the sale of the property, at any rate, where there is no covenant to pay. *Arunachalam v. Ayyavayyan* (1897), 21 Mad., 476. For instance, it does not by implication give a right to an usufructuary mortgagee to sue for the sale of the mortgaged property ; the provisions of this section being controlled by those of sec. 67. Cf. *Akbar v. Ameeroonissa* (1869), 11 W. R., 225. The mortgagee, however, is not bound to sue for his money. Thus, in one case where the second mortgagee had been dispossessed at the suit of the first mortgagee and the mortgagor re-entered upon the land when the latter was paid off, it was held that such entry gave a cause of action to the second mortgagee, who was entitled to resume possession of the mortgaged land ; but the mortgagee's claim for interest upon the mortgage-money, during the period of dispossession, was not allowed. *Narain v. Shimbhoo* (1876), 4 I. A., 15 ; 1 All., 325. Cf. *Linga v. Samaran* (1893), 17 Mad., 469. Where the mortgagee has the option to surrender the mortgaged property and claim immediate payment from the surplus sale-proceeds in the event of a sale of the estate, the purchase-money cannot be withdrawn by the mortgagor without previous notice to the mortgagee. *Bhooban v. Anundo* (1874), 22 W. R., 47.

Personal liability to repay.

Where the mortgagor binds himself to repay the same.—

In a simple mortgage, as well as in an English mortgage, the mortgagor is personally liable to repay; and the agreement need not necessarily be express. Pp. 77-80, *ante*. *Abbakke v. Kinhiamma* (1906), 29 Mad., 491; *Parbati v. Gobinda* (1906), 4 C. L. J., 246; *Ram Kissore v. Surajdeo* (1908), 9 C. L. J., 5; 13 C. W. N., 138; *Jangi v. Chandar* (1908), 30 All., 388. A promise to repay the mortgage-money carries with it a personal obligation where there is no covenant that it should be realised from the mortgaged property alone. *Bhugwan v. Parmeshwari* (1896), 5 C. L. J., 287. Every loan implies a promise to repay and creates a personal obligation. *Kerr v. Ruxton* (1906), 4 C. L. J., 510; *Ghasiram v. Raja* (1907), 6 C. L. J., 639. See also *Wahid-un-nissa v. Gobardhan* (1900), 22 All., 453, 461. A stipulation that if the debt be not paid off by the sale of the hypothecated properties, the mortgagee will be able to sell other properties of the mortgagor does not imply that the remedy against the person and other properties is postponed to that against the mortgaged properties. *Benoy v. Debendra* (1911), 15 C. W. N., 722. In an usufructuary mortgage if there is a covenant to repay the sum advanced, it is not a pure usufructuary mortgage and the mortgagee is entitled to sue the mortgagor for the mortgage-money. *Pargan v. Mahatam* (1907), 6 C. L. J., 143; *Narpat v. Ram* (1908), 30 All., 162; 5 A. L. J., 130. See also *Madho v. Devi* (1891), 11 A. W. N., 168; *Probhakar v. Davlatrav* (1876), Bom. P. J., 120; cf. *Balabhai v. Goberaj* (1895), Bom. P. J., 310, where the words *Angudhar* in a *san* mortgage were held to amount to a personal covenant; disting. *Gopala v. Aruna* (1892), 15 Mad., 304; *Munoo v. Reet Bhooban* (1866), 6 W. R., 283; *Venkata v. Venkata* (1874), 23 W. R., 91. Also compare *Chennapatnam v. Tadakamalla* (1903), 27 Mad., 86, where it was intended to relieve the obligors from any personal responsibility in respect of interest. For an instance of personal covenant to pay interest on the mortgage-money, see *Madappa v. Ramkrishna* (1911), 35 Bom., 327; 15 C. W. N., 962. See also *Chintaman v. Dulari* (1910), 33 All., 107, where the interest was held realisable as well from the mortgaged property as from the mortgagor personally, if not realised out of the profits. The personal liability of the mortgagor will subsist, though he has assigned his equity of redemption to a third person; and the latter does not by merely taking an assignment of the equity of redemption make himself personally liable; see pp. 280, 281, *ante*. Nor does a purchaser of the equity of redemption make himself personally liable by retaining in his hands a part of the purchase-money and expressly or impliedly agreeing to pay the amount to the mortgagee. *Jamna v. Ramautar* (1911), 39 I. A., 7; 34 All., 63. Cf. *In re Errington* (1894), 1 Q. B.,

Where covenant to pay in an usufructuary mortgage.

Purchaser of equity of redemption not personally liable.

11. But in the absence of any express or implied contract to the contrary the purchaser of an equity of redemption is under an implied obligation to indemnify the vendor against the mortgage-debt. *Mills v. United, &c., Bank* (1912), 1 Ch., 231. See also *Ram v. Sheodeni* (1912), 16 C. W. N., 1040.

Where the mortgagee is deprived of the whole or part of the security, &c.—See pp. 277, 278, *ante*. Where land in the possession of an usufructuary mortgagee who was bound to pay a fixed rent for it to the mortgagor, the rest of the rent and profits being taken by him in lieu of interest, was acquired for public purposes and the compensation money was taken away by the mortgagor, it was held that the latter was liable in damages to the mortgagee, the measure of which was the interest which might have been obtained by him. *Rajashaheb v. Antaji* (1895), Bom. P. J., 537. For the meaning of the word 'default' see *Gopalasami v. Arunachella* (1892), 15 Mad., 304; *Ganesh v. Sujhari* (1887), 10 All., 47. And it has been laid down broadly in one case that the breach of any of the obligations imposed on the mortgagor by sec. 65 would amount to wrongful default. *Singhjee v. Tiruvengadam* (1889), 13 Mad., 192; cf. *Hira v. Ghasitu* (1894), 16 All., 318. Where on the execution of an usufructuary mortgage the mortgagor fraudulently suppressed the fact that there was outstanding against the mortgaged property, a decree for sale on a prior mortgage, the mortgagee was held entitled to sue the mortgagor for the mortgage-money when the decree was put into execution. *Ahmad-ul-lah v. Salar* (1905), 27 All., 488; 2 A. L. J., 241. Where the owner of properties after having mortgaged them under an unregistered deed sells them for valuable consideration by a registered deed to a purchaser without notice of the mortgage, the mortgagee is entitled to sue the mortgagor for the mortgage-money. *Appasami v. Virappa* (1906), 29 Mad., 362. Of course, if the security has been lost owing to the default of the mortgagee himself, he cannot sue for the mortgage-money. *Jamnadas v. Baimuli* (1879), Bom. P. J., 487.

Waiver by mortgagee.—See *Lachman v. Baldeo* (1883), 3 A. W. N., 91. When the mortgagees allowed the mortgagor to retain possession of part of the mortgaged property without objection and made no claim in respect of the stipulation for interest in the mortgage-deed, his claim for interest on the mortgagor seeking for redemption was held to be barred by acquiescence. *Jhunku v. Chhotkan* (1909), 31 All., 325; 6 A. L. J., 247. Cf. *Lachman v. Baldeo* (1902), 29 I. A., 148; 24 All., 521; *Kishun v. Ganga* (1904), 27 All., 313. The mortgagee is bound to allow the mortgagors reasonable time to give him sufficient security for his debt, if the security is rendered

insufficient. But where the mortgagor paid no heed to the mortgagee's demand and the mortgagee waited for more than six years to bring his suit for the mortgage-money, the delay under the circumstance was not held reasonable and the suit was held to be barred. *Bhawani v. Jang* (1910), 7 A. L. J., 391.

Covenant for quiet enjoyment extends how far.

Where the mortgagee being entitled to possession, &c.—

See pp. 278-280, *ante*. Cf. *Markham v. Paget* (1908), 1 Ch. 697, as to whether an implied covenant for quiet enjoyment extends to persons claiming by title paramount. See also *Balaji v. Daji* (1884), Bom. P. J., 59, a case of eviction under a paramount title. Disting. *Khusali v. Makundi* (1882), 2 A. W. N., 99. But see *Hira v. Ghasitu* (1894), 16 All., 318, in which it has been held that the language is wide enough to embrace failure by the mortgagor to secure possession at any time during the continuance of the mortgage. See also *Pargan v. Mahatam* (1907), 6 C. L. J., 143. An usufructuary mortgagee can bring a suit for the mortgage-money on dispossession of the land given in lieu of interest, by a co-sharer of the mortgagor who obtained the same on partition, and is not precluded from so doing by section 99 of the Estates Partition Act (V of 1907, B. C.); *Talik v. Jalal* (1909), 11 C. L. J., 136. Even where by the terms of the deed the mortgagor is not bound to take an active part in delivering possession, he will be personally liable, if he prevents the mortgagee from entering upon the mortgaged property. *Linga v. Sama* (1894), 17 Mad., 469; 4 M. L. J., 143. But where it is agreed that the mortgagee shall retain possession for a fixed period to satisfy his debt, he is not entitled to bring an action under this section, though he may sue the mortgagor for damages. *Visvalinga v. Palaniappa* (1897), 21 Mad., 1. Nor can a mortgagee bring a suit to recover his money within the term of the mortgage, simply on account of a deficiency in the assets. *Sheo Shunker v. Bagehi*, N-W. P., S. D. (1861), p. 412. It may be noticed that before the Transfer of Property Act, if the mortgagee was dispossessed from merely a part of the property, he could only recover a proportionate part of the mortgage-debt. See p. 277n, *ante*.

Where security rendered insufficient.

Where by any cause other than the wrongful act, &c.—

See p. 279, *ante*; cf. *Ram Jewan v. Jagarnath* (1897), 25 Cal., 450. There may be physical destruction of the property by accident either wholly or in part so as to render the security insufficient, or depreciation in value without any physical destruction or deterioration. Where, however, the security merely assumes a new shape, as for instance where the property is compulsorily sold and the lien is transferred to the sale-proceeds, this rule does not apply; see p. 277, *ante*. See also notes to sec. 73, *post*.

Measure of damages.—The word 'mortgage-money' has not here apparently the same meaning as in sec. 58, *supra*. But damages in the nature of interest may be allowed under this section. *Linga v. Sama* (1893), 17 Mad., 469; 4 M. L. J., 143; cf. *Mahesh v. Chankharja* (1882), 2 A. W. N., 31. But both interest and mesne profits for the unexpired portion of the term of the mortgage cannot be allowed. *Kherodhar v. Doolee* (1873), 19 W. R., 424. In England the measure of damages in case of breach of a covenant for title is the original debt; *per* Patteson, J., in *Toppin v. Field* (1843), 4 Q. B., 395. But see *Sayef v. Mahamed* (1867), 7 W. R., 196; see also p. 280, *ante*. Where a mortgage-deed provided that, in the event of possession not being given, the creditor might treat the money as immediately due and recover it at once with interest at a higher rate, it was held that if the mortgagee took no steps to obtain possession of the land, he should be deemed to have waived the benefit of the provision for the higher rate of interest. *Ganga v. Lachman* (1886), 8 All., 194. The mortgagee can recover the costs of an abortive action for foreclosure. *Bhugwan v. Gobind* (1882), 9 Cal., 234; *Rasmoney v. Illahee*, S. D. A., 1854, p. 573; cf. *Baron v. Bennett* (1818), 2 Moll., 459.

Liability of purchaser of equity of redemption with notice of mortgagor ousting mortgagee.—See p. 280, *ante*; cf. *Malabar Co. v. Dayaram* (1875), Bom. P. J., 583.

When limitation may be set up as a defence.—*Umichand* Limitation. *v. Ahmed* (1898), 21 Mad., 242; *Ramjewan v. Jagannath* (1897), 25 Cal., 450. A suit under this section may not be barred although the period for enforcing a personal covenant in the deed may have expired. *Appasami v. Virappa* (1906), 29 Mad., 362; *disting.* *Sawaba v. Abaji* (1889), 11 Bom., 475; *Balaji v. Daji* (1884), Bom. P. J., 59; *Golan v. Soghra* (1875), 24 W. R., 426, not decided under the Transfer of Property Act; cf. *Umesh v. Mathur* (1891), 28 Cal., 246, where a question arose under the Succession Certificate Act.

69. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property, or any part thereof, without the intervention of the Court, is valid in the following cases 'and in no others', namely:—

- (a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a

¹ These words were inserted by Act III of 1885.

Hindu, Muhammadan or Buddhist 'or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette' ;

- (b) where the mortgagee is the Secretary of State for India in Council ;
- (c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi, '[Rangoon, Moulmein, Bassein or Akyab].

But no such power shall be exercised unless and until—

- (1) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service ; or
- (2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised ; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

¹ These words were inserted by Act III of 1885, s. 5.

² These words were substituted

for the words " or Rangoon " by Act VI of 1904, s. 4.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in sections 6 to 19 (both inclusive) of the Trustees' and Mortgagees' Powers Act, 1866, shall be deemed to apply to English mortgages, wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette.

A power, &c., to sell.—A power of sale in a mortgage-deed is nothing but an authority to defeat the equity of redemption. See *In re Harwood* (1887), 35 Ch. D., 470; *In re Morretti* (1886), 18 Q. B. D., 222. But the mortgagee can convey the property only for such estate and interest therein as is the subject of the mortgage. Cf. sec. 21 (1), Conveyancing Act, 1881; and see *In re Hodson and Howes' Contract* (1887), 35 Ch. D., 668. A power of sale does not affect the ordinary right of a mortgagee to foreclose the mortgage. *Goburdhun*

Power of sale
in mortgage-
deeds.

¹ These words were inserted by Act III of 1885, s. 5.

Sale in exercise of power.

v. Sonatun (1874), 23 W. R., 84; *Perry v. Keane* (1837), 6 L. J. (N. S.), Ch., 67; *Wayne v. Hanham* (1851), 9 Hare, 62. But the absence of any provision similar to that contained in sec. 21 (5) of the Conveyancing Act, 1881, is likely to give rise to controversy. A sale by the mortgagee in order to pass an indefeasible estate must be in pursuance of the power to sell. *Doucett v. Wise* (1865), 3 W. R., 157. But a covenant by the mortgagor that he will join in the sale is for the benefit of the mortgagee only, and not of the purchaser who is not entitled to claim such concurrence by virtue of the covenant. *Coder v. Morgan* (1811), 18 Ves., 344, 346n; *Alexander v. Crosbie* (1844), 1 J. & L., 666, 670; *Gutteridge v. Fletcher* (1865), 12 L. T. (N. S.), 830. The title under the power from the mortgagee himself is sufficient in law, and a sale by the mortgagee under a power though effected after an attachment of the property by a judgment-creditor of the mortgagor will, therefore, pass an irredeemable title. *Byrne v. Bain*, Punjab Record, No. 68 of 1875. A purchaser at a sale by the mortgagee under his power of sale is not a person claiming through the mortgagee so far as relates to the present right to recover possession of the property. *Chabiladas v. Mowji* (1901), 26 Bom., 82; 3 Bom. L. R., 456. Where a contract for sale of immovable property contained an agreement empowering the vendor to sell on default of payment of certain instalments of the purchase-money it was held that, the power of sale being invalid under section 69, the agreement could not be given effect to. *Nawab Begam v. Creel* (1905), 27 All., 678.

Warranty of title.

Liability of mortgagee as to title.—It would seem that, in the absence of fraud on the part of the mortgagee, an eviction suffered by the purchaser would afford no ground for an action for recovery of the purchase-money, if paid, or of defence to an action by the vendor for its recovery, if only security was taken. Cf. *Kelleher*, p. 144.

Towns of Calcutta, Bombay, &c.—Land situate in the district of Mahim within the island of Bombay, and within the local limits of the original jurisdiction of the High Court, is situate in the town of Bombay, within the meaning of this section. *Trimbak v. Bhagwan* (1890), 23 Bom., 348. But Calcutta does not include the added area. *Biraj v. Gopeswar* (1899), 27 Cal., 202.

Who can exercise power of sale.

Who is entitled to exercise the power.—It seems only the original mortgagee or any person on his behalf named in the power, though in the case of a mortgage to two or more persons, the power will enure by survivorship. *Hood and Challis*, 67; see also *Hind v. Poole* (1855), 1 K. & J., 383. For the grounds for this restriction, see p. 19, *ante*. Under the English Conveyancing Act, which is not based on any considerations of personal confidence, the power of sale may be

exercised not only by the original mortgagee, but also by any person deriving title under him, or entitled for the time being to give a discharge for the mortgage-money; see sec. 2 (vi) and cf. sec. 21 (4). And this is only proper, as powers of sale fall under the class of powers appendant or annexed to the estate and, therefore, form part of the mortgage-security. They will, therefore, on a well recognised principle vest in any person whether named or not, who by assignment or otherwise becomes entitled to the money secured to be paid. 4 Kent, 167, 168. An agent authorized to sell any property then or thereafter belonging to the principal, and also to receive and give a discharge for any moneys then or thereafter owing to the principal by virtue of any security, is not, however, authorized to sell property held by the principal as mortgagee under the mortgagee's statutory power of sale. *In re Dowson and Jenkins' Contract* (1904), 2 Ch., 219. But the English law on the subject, where there is an express power of sale, is in a somewhat fluid state. Coote, p. 902; for another recent case, see *In re Runney and Smith* (1897), 2 Ch., 351. The power, however, is clearly not divisible, and an assignment by the mortgagee of a part of his interest in the mortgage-debt and estate, will not carry with it a corresponding portion of the power. 4 Kent, 167, 168. As to who is an assignee within the meaning of an express power of sale, see *Saloway v. Strawbridge* (1855), 1 K. & J., 371; 7 DeG. M. & G., 594. It is also well settled that though the exercise of a power of sale is a purely ministerial act, which may be done by attorney, if the power is given to the mortgagees by name, one of them has no implied authority to sell on behalf of the others, though they may all be partners. *Warr v. Jones* (1876), 24 W. R. (Eng.), 695.

Power of sale,
annexed to the
estate.

Power not
divisible.

When Power extinguished or suspended.—The power will not be extinguished by an ineffectual attempt to exercise it. *Henderson v. Astwood* (1894), A. C., 150. But it may be determined unless care is taken to provide for its continuance, either on the alteration of the mortgage by a further charge and additional security, or on a sub-mortgage. Dart, pp. 61, 62; *Boyd v. Petrie* (1870), 10 Eq., 482; *Young v. Roberts* (1852), 15 Beav., 558; *Curling v. Shuttleworth* (1829), 6 Bing., 121; *Cruse v. Nowell* (1856), 25 L. J. (Ch.), 709. A mortgagee cannot, after the usual order *nisi* for foreclosure and before the foreclosure is made absolute exercise his power of sale without the leave of the court; though a *bonâ fide* purchaser without notice may get a good title under the power. But the power is only suspended, not extinguished. *Stevens v. Theatres Ltd.* (1903), 1 Ch., 857.

Mortgagee not a trustee of the power for the mortgagor.

—See in addition to the cases in note 1, p. 275, *ante*, *Trimbak v. Bhagwan* (1898), 23 Bom., 348; *Colson v. Williams* (1889), 58 L. J.

Mortgagee not
a trustee of
power for
debtor.

Ch., 593; *Marriott v. Anchor Reversionary Co.* (1861), 30 L. J. Ch., 571; *Davey v. Durrant* (1857), 1 DeG. & J., 535; *Nash v. Eads* (1878), 25 Sol. Jo., 95. The law on the subject is thus stated in Coote, p. 917.

“A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interest alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor, that is all.” In other words, the mortgagee is only required to act in good faith, and in determining whether his conduct comes up to the required standard, regard must be had to the circumstances of the particular case. A sale by the assignees of a mortgage in the exercise of a power of sale contained therein was not set aside merely on the ground that there had been reckless disregard of the mortgagor's interests in the conduct of the sale, where the pleadings contained no charge of fraud or collusion or bad faith against the defendant purchasers and also where there had been no notice before trial that inadequacy of price would be relied on as evidence thereof. *Haddington Island, &c. v. Huson* (1911), A. C., 722. As to what amounts to a binding waiver of the right to sell, see *Trimbak v. Bhagwan*, supra; cf. *Williams v. Stern* (1879), 5 Q. B. D., 409. But neither mortgagee nor his agent can buy. See p. 276, ante; cf. *Orme v. Wright* (1839), 3 Jur., 19. It is otherwise, where the mortgagee buys with the consent of the mortgagor. *Waters v. Groom* (1844), 11 Cl. & F., 648; *Purmanandhar v. Jamna* (1885), 10 Bom., 49. But a puisne mortgagee is under no such disability. *Parkinson v. Hanbury* (1860), 1 Dr. & Sm., 143; *Kirkwood v. Thomson* (1865), 2 DeG. J. & S., 613. It was otherwise in the Roman law. Kelleher, pp. 146-147. There is also nothing to prevent one of several mortgagors, co-tenants of the mortgaged premises, from buying at the sale and acquiring an absolute title, though the price paid by him is only the amount due to the mortgagee. *Kennedy v. DeTrafford* (1897), A. C., 180.

What the mortgagee is expected to do.

Who can purchase.

What is meant by a part.

The mortgaged property or any part thereof.—The words “any part thereof” mean any part of the mortgaged property which is land. Fixtures, therefore, cannot be sold apart from the land, though the power of sale may be so worded as to authorise a separate sale of the fixtures. *Southport, &c. v. Thompson* (1887), 37 Ch. D., 64; *Hawtry v. Bullin* (1873), L. R., 8 Q. B., 290; *In re Yates* (1888), 38 Ch. D., 112; *In re Joyce* (1874), L. R., 9 Ch., 577; *In re Brooke* (1894), 2 Ch., 600; *Olímpson v. Coles* (1889), 23 Q. B. D., 465. It should also be noticed that the power to sell any part of the property only applies laterally and not vertically, so that mines cannot be sold apart from the surface or vice versa. *Buckley v. Howell* (1861), 29

Beav., 546. In England the court has now statutory power to authorise the mortgagee unless expressly forbidden to do so, to sell the land without the minerals. *In re Beaumont's Mortgage, &c.* (1871), 12 Eq., 86; *In re Wilkinson's Estates* (1872), 13 Eq., 634. Similarly a mortgagee cannot sell the timber apart from the land. *Cholmeley v. Paxton* (1825), 3 Bing., 207; *Cholmeley v. Paxton* (1828), 5 Bing., 48. But though a mortgagee when selling under the statutory power of sale has not the same full power over the property as an absolute owner, he can convey the property to a purchaser with all the legal incidents accompanying the grant, and, on a sale of part of the property comprised in the mortgage, can give to the purchaser an implied easement over the unsold portion. *Born v. Turner* (1900), 2 Ch., 211; (1900) W. N., 122.

But no such power shall be exercised until and unless, &c.—It will be noticed that though the first part of the section speaks of default in payment of the mortgage-money, the notice which is required to be served is one requiring payment of the principal money only. The reason for this difference is not clear, particularly in face of the provisions of the Conveyancing Act, 1881, sec. 20, on which the section seems to be based. Another point of difference between the English law and the enactment contained in the present section is that the power of sale can only be exercised in default of payment of the mortgage-money, and not in case of a breach of any other condition. It will also be observed that notice is only necessary when default is made in payment of the principal, and no notice is required, if interest is unpaid for three months. It is not competent to a mortgagee who has given notice under this section calling in principal and interest and for a sale in default of payment, to exercise a power of sale for interest in arrears before the expiry of three months from the service of the notice. When a mortgagee exercises his power of sale for arrears of interest, the mortgagor must pay up all the interest due up to the date of payment and the mortgagee is justified in refusing to accept a smaller sum. *Doolabh Das v. Chhabildas* (1899), 1 Bom. L. R., 273.

On whom notice should be served.—Where there are several mortgagors having distinct successive interests, as a tenant for life and remainderman, separate notices should be given to them as there is no very strong reason why the phrase "several mortgagors" should not apply to several mortgagors having different interests in the property, e.g., a tenant for life and remainderman. Coote, 913. Hood and Challis, 71. As the Act makes no mention of assigns, notice to the mortgagor or to one of several mortgagors would seem to be enough. And a fresh notice need not certainly be given to an assignee who takes

When land without minerals may be sold.

Notice necessary before exercise of power.

Service of notice.

Where no person existing to accept notice.

a transfer after notice has been served on the mortgagor. *Muncherji v. Noor Mahomed* (1893), 17 Bom., 711. For the English law on the subject, see *Hoole v. Smith* (1881), 17 Ch. D., 434; *Hawkins v. Ramsbottom* (1814), 1 Price, 138; *Forster v. Hoggart* (1850), 15 Q. B., 155; *Selwyn v. Garfit* (1887), 38 Ch. D., 273, where it was held that a mortgagor cannot waive a notice as against his assignee. Disting. *Major v. Ward* (1847), 5 Hare, 598. If there is no person in existence to whom notice should be given, the power cannot be exercised. *Parkinson v. Hanbury* (1860), 1 Dr. & Sm., 143. But the disability of the person on whom notice is to be served will not suspend the exercise of the power. *Tracy v. Lawrence* (1854), 2 Drew, 403; cf. *Ras-muni v. Prankrishen* (1848), 4 Moo. I. A., 392. It seems that the court will not be astute to set aside a sale on account of a technical flaw in the notice. Thus a sale, which took place after the expiration of the proper interval after the service of notice was sustained, though the notice declared the intention to sell, when that interval had elapsed from its date. *Metters v. Brown* (1863), 33 L. J. Ch., 97. A notice served by a mortgagee after the mortgage-money has become payable requiring payment at the expiration of three months from the date of the notice, is a good notice. Three months' default in payment begins to run from the date of service and not from the date fixed by the notice for payment. *Barker v. Ilingworth* (1908), 2 Ch., 20. For revivor of notice, see *Wood v. Murton* (1878), 47 L. J., Q. B., 191.

Where debt payable by instalments.

Debt payable by instalments.—Where the mortgage-money is repayable by instalments, the deed should provide that the power shall become exercisable within a specified time after the non-payment of any instalment, unless the deed contains a provision that on default in payment of any instalment, the whole of the remaining money shall become due. Hood and Challis, 71. Cf. Kelleher, p. 189.

Interest in arrear where mortgagee in possession.—

As to whether the interest can be said to be in arrear where the mortgagee is in possession and there is in his hands, after deducting outgoings an amount arising from the rents received by him sufficient for the payment of the interest, see p. 564, *ante*.

Sale how to be conducted.

Sale how to be conducted.—The mortgagee may sell either together or in lots, by public auction or private contract, subject to such conditions respecting title or evidence of title, or other matter, as he thinks fit, with power to vary any contract for sale, and to buy in at an auction,* or to rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby. See *Davey v. Durrant* (1857), 1 DeG. & J., 535; *Falkner v. Equitable, &c., Society* (1859), 4 Drew, 352. It is, however, somewhat doubtful

whether the mortgagee may join with the owner or mortgagee of another property in selling the two together, though a higher price can be thus obtained. For the law in England on the subject, see *Hiatt v. Hilman* (1871), 25 L. T., 55; *In re Cooper & Allen's, &c.* (1876), 4 Ch. D., 802. There can, however, be no objection to the first and second mortgagee combining together to sell the property, each giving a receipt for the proportion of the purchase-money paid to him. *M'Carogher v. Whieldon* (1864), 34 Beav., 107. As a rule the sale ought to be for money, though the mortgagee may allow a portion of the purchase-money to remain on mortgage, if he is willing to charge himself with the amount in account with the mortgagor. *Farrar v. Farrars* (1888), 40 Ch. D., 395; *Thurlow v. Mackeson* (1868), L. R., 4 Q. B., 97; *Davey v. Durrant*, *supra*. The mortgagee may also accept the purchaser's cheque for the deposit, and if it is dishonoured, he may add the costs of the abortive sale to his security. *Muttie v. Benney* (1887), 25 Ch. D., 636; *Farrer v. Lacy* (1865), 31 Ch. D., 42.

When a sale has been made in professed exercise of such a power, &c.—The words 'in professed exercise of such power' are equivalent to purporting to be made in pursuance of the power, the Act making no distinction between a case where the exercise of the power is absolutely unauthorised, and one where it is improperly exercised for want of notice or otherwise. A sale, therefore, to a *bonâ fide* purchaser without notice would be valid, even if the security should prove to have been satisfied. *Dicker v. Angerstein* (1876), 3 Ch. D., 600; cf. *Madras D. & B. Society v. Passanba* (1885), 11 Mad., 201. But a purchaser taking with actual notice would not, it seems, be protected, as the second paragraph of the section only embodies the usual clause in a mortgage with a power of sale, which has never been held to protect a purchaser with notice of the irregularity of the sale. See p. 275 *ante*; see also *Chhabildas v. Dayal* (1907), 34 I. A., 179; 31 Bom., 566. Cf. *Kershaw v. Kalow* (1841), 1 Jur., 974; *Bailey v. Barness* (1894), 1 Ch., 25. In *Selwyn v. Garfit* (1887), 38 Ch. D., 273, Cotton, L. J., seems to have thought that notice of an irregularity would throw upon the purchaser the duty of making enquiries which he might otherwise have safely neglected; but Bowen, L. J., seems to have thought that a waiver might without enquiry be presumed as against the mortgagor but not against subsequent incumbrancers. It is, however, quite open to the mortgagor after the sale to come forward, and to say "I will convey and confirm this sale," notwithstanding any alleged irregularity. *In re Thompson and Holt* (1890), 44 Ch. D., 492, 500. As the protection afforded by this section extends only to cases of professed exercise of the statutory power, such power should be expressly referred to in the conveyance; and it has been held in

Mode of conducting sale.

Sale where unimpeachable.

Power should be referred to in conveyance.

England that the provision in sub-section 2, sec. 21 of the Conveyancing Act, does not apply, until the conveyance has been actually obtained. *Life Interest, &c., Corporation v. Hand-in-Hand Fire, &c., Insurance Society* (1898), 2 Ch., 230. But the present section is differently worded. As to waiver of notice, see *In re Thompson and Holt*, supra.

Laches of mortgagor.—An action to set aside a sale of a reversionary interest nearly ten years after the sale but shortly after the reversion fell into possession was dismissed in England on the ground of laches. *Nutt v. Easton* (1900), 1 Ch., 29.

Damages for irregular sale.

Damages for unauthorised sale.—Damages may be given for an unauthorised, improper or irregular sale; as selling before the time fixed, *Brierley v. Kendall* (1852), 17 Q. B., 937; without proper notice, *Selwyn v. Garfit* (1887), 38 Ch. D., 273; when nothing was due, *Dicker v. Angerstein* (1876), 3 Ch. D., 600; after demand by an agent of the mortgagee for payment, without allowing time to the mortgagor to verify the agency, *Moore v. Shelley* (1883), 8 App. Cas., 285; after demand at the mortgagor's place of business as provided in the mortgage-deed, but in the mortgagor's absence and without giving a reasonable opportunity to hear of the demand or comply with it, *Massey v. Sladen* (1868), L. R., 4 Ex., 13. As to the measure of damages, see *Marriott v. The Anchor, &c., Co.* (1861), 3 DeG. F. & J., 177; *Wolff v. Vanderzie* (1869), 20 L. T., 253; *National Bank of Australasia v. United, &c., Co.* (1879), 4 App. Cas., 391. If there has been any mis-statement in the particulars of sale, the mortgagee must account for the difference between the price actually realized and that which the property would have realized, if there had been no mis-description. *Tomlin v. Luce* (1890), 43 Ch. D., 191.

When sale restrained by injunction.

Injunction to restrain sale.—The mere commencement of an action for redemption will not stop the sale. *Jagjivan v. Shridhan* (1877), 2 Bom., 252; *Muncharji v. Noor Mahomed* (1893), 17 Bom., 711; *Prichard v. Wilson* (1864), 10 Jur. (N. S.), 330; *Adams v. Scott* (1859), 7 W. R. (Eng.), 213; disting. *Rhodes v. Buckland* (1852), 16 Beav., 212; *Macleod v. Jones* (1883), 24 Ch. D., 289. But sales have been restrained pending a redemption action made necessary by a refusal to accept payment; though the tender did not include the costs, the amount of which was unascertained, the security being ample; *Jenkins v. Jones* (1860), 2 Giff., 99; also after a threat to sell unless the mortgagor paid another sum not chargeable against him. *Whitworth v. Rhodes* (1850), 20 L. J. Ch., 105. For a somewhat curious case in which a mortgagor indirectly restrained a sale, see *Brewer v. Square* (1892), 2 Ch., 111. Again though mere hardship is no ground for an injunction, an injunction will certainly be granted to restrain

a sale at a time and in a manner contrary to the terms of the power. *Mortgagor must pay the whole sum.* *Gill v. Newton* (1866), 12 Jur. (N. S.), 220. To obtain an injunction, the mortgagor must pay into court the whole of the sum which the mortgagee swears is due to him. *Hill v. Kirkwood* (1880), 28 W. R. (Eng.), 358; unless the terms of the mortgage-deed show that a less sum is due, *Hickson v. Darlow* (1883), 23 Ch. D., 690, or a fiduciary relation exists between mortgagor and mortgagee. *MacLeod v. Jones* (1883), 24 Ch. D., 289. In the absence of any such circumstance, the word of the mortgagee must for the purpose of the injunction be taken as conclusive. On the principle that one cannot blow both hot and cold, a puisne mortgagee cannot take advantage of an agreement by a prior mortgagee not to exercise his power of sale, if the former repudiates the other terms of the agreement. *Cockell v. Bacon* (1852), 16 Beav., 158.

Pleadings in action to restrain sale.—The pleadings in an action for restraining a sale by the mortgagee must clearly disclose the fraud or irregularity on the basis of which relief is sought. *Adams v. Scott* (1859), 7 W. R. (Eng.), 213.

Appropriation of purchase-money.—The mortgagee will be answerable, if he pays the surplus to the wrong person. Thus if the first mortgagee, with notice of a second mortgage, pays over the balance of the purchase-money to the mortgagor, he will be liable for it to the second mortgagee. See p. 318, *ante*. But where the mortgagee conveys under his power of sale after the right of the mortgagor has been extinguished by limitation, the latter has no right to the surplus of the purchase-money. *In re Alison* (1879), 11 Ch. D., 284. If there is a surplus in the hands of the mortgagee and he cannot ascertain to whom it is payable, he is bound to set it apart in such a way as to be fruitful for the benefit of the person who may turn out to be entitled to it. *Charles v. Jones* (1887), 35 Ch. D., 545; *Abdul v. Noor Muhomed* (1891), 16 Bom., 141; cf. *Elcy v. Read* (1897), 76 L. T., 39; *Tanner v. Heard* (1857), 23 Beav., 555. But if the surplus remains unproductive in consequence of notice from persons interested not to part with it pending disputes as to title, the mortgagee will not be chargeable with interest. *Mathison v. Clarke* (1855), 25 L. J. (N. S.), Ch., 29.

Residue of the money so received shall be paid, &c.—*Surplus-proceeds how paid.* Surplus-proceeds of the conversion of the mortgaged property may, nevertheless to avoid circuity of action, be retained by the mortgagee in payment of debts, other than the mortgage-debt due to him from the mortgagor as against the mortgagor's estate, when solvent. See pp. 404, 405, *ante*.

Period of Limitation.—The same as in the case of an express trust. See *In re Bell* (1886), 34 Ch. D., 462; see also *Hood & Challie*, p. 73.

Mortgagee can sue for deficiency.

Right of mortgagee to sue for deficiency.—The mortgagee can sue the mortgagor for the deficiency, if the proceeds of the sale are insufficient to discharge the mortgage-debt. *Smith v. Baker* (1873), L. R., 8 C. P., 350. Disting. *Suroop v. Hurriah* (1862), 1 Hay, 60. For the Roman law on the subject see Kelleher, 149.

Nothing in the former part of this section, &c.—Cf. sec. 19, sub-section 4, Conveyancing Act, 1881. It seems that this section will apply to a mortgage-deed executed after the Act came into force in pursuance of a contract entered into before the 1st July 1882. For the former state of the law, see in addition to the cases cited at p. 19, *ante*, *Keshavrrav v. Bhavanji* (1871), 8 Bom. H. C., A. C., 142; *Vencata v. Vencata* (1874), 23 W. R., 91; *Byrne v. Bain*, Punjab Record, No. 68 of 1875. It may be noticed that in England a direction to raise money by mortgage will carry with it an authority to create a mortgage with a power of sale. *In re Chawner's Will* (1869), 8 Eq., 569; *Leigh v. Lloyd* (1865), 35 Beav., 455.

Trustees' and Mortgagees' Powers Act.

Trustees' and Mortgagees' Powers Act, 1866.—The last paragraph of this section seems to be based upon a misapprehension of the provisions of the Act to which it refers, and as pointed out by Mr. Macpherson, *Law of Mortgage*, p. 674, the result is that when an English mortgage contains no express power of sale, one set of rules, namely, those laid down by Act XXVIII of 1866 is applicable to the exercise of a power of sale; while if the mortgage contains an express power of sale, the exercise of the power is governed by another set of rules, namely, those contained in this section. It may be here noticed that the word 'deed' in sec. 6 of Act XXVIII of 1866 will include a memorandum of deposit, though an equitable mortgagee cannot convey the legal estate. *In re Hodson & Houes Contract* (1887), 35 Ch. D., 668. But debenture holders are not entitled to claim a right of sale. *Blaker v. Herts, &c., Co.* (1889), 4 Ch., D., 399.

Mortgage of stocks and shares.

Mortgage of shares.—It has been held in England that a mortgage of stocks and other like securities of a fluctuating value carries with it a power of sale after failure to pay at the fixed time and where no time is fixed, after the lapse of a reasonable time. *Deverges v. Sandeman, &c., Co.* (1902), 1 Ch., 579. But sec. 19 of the Conveyancing Act, 1881, conferring on a mortgagee, where the mortgage is by deed, a power of sale, does not apply to the debentures of a joint stock company; *Blacker v. Herts, &c., Co.* (1889), 21 Ch. D., 399. See also *Marshall v. South &c. Co.* (1889), 2 Ch., 36.

Accession to mortgaged property.

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the

absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Illustrations.

(a) *A* mortgages to *B* a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, *B* is entitled to the increase.

(b) *A* mortgages a certain plot of building land to *B* and afterwards erects a house on the plot. For the purposes of his security *B* is entitled to the house as well as the plot.

Accessions made to the mortgaged property.—See pp. 283-286, 289, 290, and notes to sec. 8, *ante*. See also *Cullwick v. Swindell* (1866), 3 Eq., 249; *Ellis v. Glover, &c.* (1908), 1 K. B., 388. And there is no distinction in the English law between freehold and leasehold premises with reference to this question; *Reynolds v. Ashby* (1904), A. C., 466. But an equitable mortgagee cannot in England claim priority as regards his charge over the interest of persons who let machinery upon the hire-purchase system anterior to the equitable mortgage. *In re Samuel Allen & Sons Ltd.* (1907), 1 Ch., 575. A mine or quarry opened by the owner of the inheritance, while he was still in actual possession, after the date of the mortgage, will enure for the benefit of the mortgagee. *Elias v. Snordon, &c.* (1879), 4 App. Cas., 454.

Pictures.

Mines and quarries.

Enlargement of mortgagor's interest.—See p. 291, *ante*. An enlargement of the interest of the mortgagor, however, does not in all cases enure for the benefit of the mortgagee. A mortgagee of Deshgat Vatan knew that the property mortgaged was appurtenant to an hereditary office and inalienable by his mortgagor beyond his lifetime. Subsequently to the mortgage, the estate of the mortgagor was enlarged into an absolute ownership. The mortgagee, however, was held not entitled to retain the property in virtue of the mortgage after the death of the mortgagor and it was held that the mortgagee took only such estate as the holder of the Vatan property was capable of conveying at the time of the mortgage. *Gangulai v. Baswant* (1909), 34 Bom., 175; 12 Bom. L. R., 143.

Enlargement of mortgagor's interest when does not benefit mortgagee.

Right of puisne mortgagee who redeems.—The accessions will enure to the benefit of a puisne mortgagee who redeems a prior security. See p. 283, *ante*. As to the right of an equitable mortgagee, see above and p. 283*n.*, *ante*; cf. *In re Roche's Estate* (1885), 25 L. R. Ir., 58, 284.

Into whose hands accessions may be followed.—See p. 288, *ante*. Where a lease was renewed with his own money by the

Where lease
is renewed.

husband of the grantor of an annuity charged on the lease, it was held that as he took in right of his wife and had the opportunity of renewing in that right, he was in no better position than the grantor, as he took with notice of the charge. It was also held that the grantee was not bound to contribute to the expense of the renewal. *Moody v. Mathews* (1801), 7 Ves., 174; cf. *Sims v. Helling* (1851), 21 L. J. (N. S.), Ch., 76. But in one case where a sale was delayed by the court to prevent the loss which would have resulted from a forced sale and additions were afterwards made to the property, it was held that the creditor getting the benefit of the increased value on sale could not claim the value of the additions without allowance for labour and costs. *Hill Pottery, Re* (1866), 15 W. R. (Eng.), 97.

Renewal of
mortgaged
case.

71. When the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Mortgagee's
right to follow
renewed lease.

Right of mortgagee to follow renewed lease.—See pp. 287-290, *ante*. The renewal will be subject to the mortgage, though the lease had not been customarily renewed or the period of the old lease had actually expired, or the renewal was for a different term or at a different rent or other lands not comprised in the original lease were included. But in the last case, the lease of the additional lands will not be a graft. *Acheson v. Fair* (1843), 2 Conn. & Laws., 205; and see Lewin, p. 204. Where the mortgagor renders the renewal impossible by purchasing the reversion, the estate so acquired will be subject to the mortgage. See p. 287, *ante*; cf. *Evans v. Walshe* (1805), 2 Sch. & L., 519; 12 R. R., 88 n.; *In re Lord Ranelagh's Will* (1884), 26 Ch. D., 590; *disting.* *Randall v. Russell* (1817), 3 Mer., 190. In other words, the mortgagor cannot intercept and cut off the chance of future renewals to the prejudice of the mortgagee; and the reversion is therefore considered as a substitution for the original security.

Preferential right of the mortgagee.—The right of the mortgagee to the accession will override the solicitor's lien for costs. *Smith v. Chichester* (1842), 2 Dr. & War., 393. It will also override the right of the Crown against its debtor, though the lease is renewed after the accrual of the Crown debt. *Factor v. Philpott* (1823), 12 Price, 197.

72. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary—

Rights of mortgagee in possession.

- (a) for the due management of the property and the collection of the rents and profits thereof;
- (b) for its preservation from destruction, forfeiture or sale;
- (c) for supporting the mortgagor's title to the property;
- (d) for making his own title thereto good against the mortgagor; and
- (e) when the mortgaged property is a renewable leasehold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

When during the continuance of mortgage, &c.—For the right of a mortgagee to take possession himself or appoint a receiver see pp. 305—307, 518—520, *ante*. As to when a mortgagee may be said to take possession, see pp. 521—525, *ante*. See also *Flint v. Walker* (1847), 5 Moore P. C., 180.

Cases where
the mortgagee
may spend
money :
management.

For the due Management of the property, &c.—See pp. 541, 542. See also *Brojonath v. Bhugobutty* (1864), 1 W. R., 133. Police charges, discount and patwarree's fees are also allowed to the mortgagee in the North-West over and above the usual allowance of 10 per cent. for expenses of collection. *Herra v. Lachman*, S. D., N.-W. P. (1858), 447. A mortgagee will be also allowed payments to a person for taking charge of the premises to save them from deterioration. *Brandon v. Brandon* (1862), 10 W. R. (Eng.), 287. For the apportionment of expenses where only the old establishment is employed in managing the mortgaged estate ; see *Leith v. Irvine* (1833), 1 M. & K., 277. An agreement whereby a mortgagee in possession agrees with his mortgagor to charge for his personal services is valid if it does not constitute a clog on the equity of redemption. *Hope Mills, Ld. v. Ready-money* (1910), 13 Bom. L. R., 162.

Preservation
from destruc-
tion.

For its preservation from destruction, &c.—The mortgagee will be entitled to add to the mortgage-debt any inevitable charge such as selami, local cesses or enhanced assessment imposed on the property since the execution of the mortgage ; unless the terms of the contract expressly or by implication place the burden on him. *Sadanand v. Ratanji* (1886), Bom. P. J., 68 ; *Ahmed Fakir v. Dayabhai* (1896), Bom. P. J., 710. Such payments will not be treated as mere outgoings. Apart from special stipulation, a mortgagee is under no liability to pay assessment as between himself and his mortgagor ; and if he pays it for the purpose of preserving his security, then he is ordinarily entitled to add that amount to his mortgage-money and require that amount to be paid before he is redeemed. If the mortgagee agrees to pay a certain sum as assessment and the assessment is subsequently increased, he is entitled to add the amount of the excess payments to his mortgage-debt. *Nilawa v. Krishnappa* (1906), 8 Bom. L. R., 350.

In one case, shares of two villages *A* and *K* were mortgaged. The mortgagee was to have possession, realise the rents and profits and pay the Government revenue which was separately assessed on the two shares. Out of the balance, he was to retain the interest on the loan and pay the mortgagor a sum as *malikhana*. It was also stipulated that in case of enhancement of revenue, the liability to pay the additional amount would be the mortgagor's. The revenue in respect of both the properties was enhanced. The equity of redemption in

village *A* was sold and there was an apportionment of the *malikhana* at the instance of the purchasers. The enhanced revenue paid on account of this village used to be deducted from the *malikhana* paid to the purchasers, but the mortgagee paid the full amount of the *malikhana* in respect of the other village *K*, to the mortgagor. *K* was afterwards purchased by the mortgagee in execution of a decree on a prior mortgage of the village to him. On the purchasers of the equity of redemption in *A* seeking to redeem that property, it was held that the mortgagee was not entitled as against the purchasers to tack on to the mortgage-money the amount of enhanced revenue paid on account of village *K*, and that any equity that might be invoked against the mortgagor did not arise as against the purchasers. *Bohra Thakur v. Collector of Alighur* (1910), 37 I. A., 182; 32 All., 612. The word "sale" here must be understood *ejusdem generis* with destruction and forfeiture; see p. 544, *ante*. See also *Gudhar v. Bhola* (1888), 10 All., 611; *disting.* *Anon.* (1740), 1 Atk., 103; *Perianna v. Marudainayagam* (1899), 22 Mad., 332; 9 M. L. J., 166. Where, therefore, the sale would only operate on the equity of redemption, the mortgagee will not be entitled to add any payments made by him to his security. *Nursing v. Nabayandus* (1890), Bom. P. J., 211. On the other hand, the mortgagor's right to redeem will not be extinguished by a purchase by the mortgagee, if the latter makes default in paying an assessment which he is bound to discharge. See pp. 258, 259, *ante*. In Bombay the mortgagee, before the Transfer of Property Act, ranked as a salvage creditor in respect of his outlay. *Balaji v. Nana* (1881), Bom. P. J., 195. Cf. Kelleher, p. 119. It may be here noticed that in Ireland payments made by a mortgagee for head-rents are treated as a salvage charge against the inheritance, though the mortgagee knowingly suffers the tenant for life to remain in possession without paying such rents. *Hill v. Brown* (1844), 6 Ir. Eq. R., 403. But if there is a prior charge, the mortgagee in possession is bound to apply the rents and profits in discharge of the redemption-money in priority to the debt due to him on his security. *Sloan v. Mohon* (1837), 1 Dr. & W., 189.

For supporting mortgagor's title, &c.—See pp. 542, 543, *ante*; cf. *Subbanha v. Yacoo Ali* (1886), 1 C. P. L. R., 66. See also *Barry v. Stawell* (1838), 1 Dr. & Wal., 618, where a mortgagee who unsuccessfully defended an action against the land at the request of the mortgagor was held entitled to be paid his costs in equal priority with his mortgage-debt as against puisne incumbrancers. Cf. *Owen v. Crouch* (1857), 5 W. R. (Eng.), 545; *disting.* *Horlock v. Smith* (1844), 1 Coll., 298; *Peers v. Cheeley* (1852), 15 Beav., 209; *Dryden*

Payment with regard to one property not charged against another.

Salvage charges.

Supporting mortgagor's title.

v. *Frost* (1838), 3 Myl. & C., 670. But in a case decided before the Solicitor Mortgagee's Costs Act, where a mortgagee acted as his own solicitor in a suit in defence of his own title, he was only allowed, as against a second mortgagee, his costs out of pocket. *Sclater v. Cottam* (1857), 3 Jur. (N. S.), 630.

Cost of action
when allowed.

For making his own title thereto, &c.—See pp. 543, 544, *ante*. In England, it is, of course, to allow the costs of an action on the covenant, if they have been properly incurred. *Merriman v. Bonner* (1869), 10 Jur. (N. S.), 534. Disting. *Fletcher, Ex Parte* (1830), Mont., 454; *Lewis v. John* (1838), 9 Sim., 366. Costs of obtaining administration. See *Ramsden v. Langley* (1705), 2 Vern., 536; *Hunt v. Fawnes* (1803), 9 Ves., 70. Disting. *Ward v. Barton* (1841), 11 Sim., 534.

Renewal of
lease.

For renewal of mortgaged lease.—See pp. 287, 304, 544, *ante*.

Outlay by mortgagee whose title is disputed.—See *Bindubasini v. Harendra* (1879), 25 Cal., 305; see also *Budan v. Seetal* (1866), 5 W. R., 126. In neither of these cases, however, was any right to charge the land claimed by the plaintiffs.

Whether mort-
gagor is per-
sonally liable.

Remedy of Mortgagee.—It seems to be doubtful whether the mortgagee can, in the absence of a covenant to that effect, recover any money which he may spend under this section personally from the mortgagor. See pp. 541, 542, 558-560, *ante*. *Baranna v. Bala* (1899), 9 M. L. J., 177; but see *Imdad v. Bodri* (1895), 20 All., 401. See also Hood and Challis, p. 69, where it is said that a mortgage-deed ought to contain a covenant for the repayment of such money. For the Roman law on the subject, see Kelleher, p. 189. When the mortgagee makes a payment which the mortgagor was bound by law to make the mortgagee has a remedy against the mortgagor personally under sec. 69 of the Contract Act independently of the provisions of this section. *Umesh v. Khulna Loan Co.* (1906), 34 Cal., 92. Usufructuary mortgagee. See pp. 559, 560, *ante*. An usufructuary mortgagee who cannot claim a right of sale is not entitled to any charge in respect of payments made by him for the protection of the mortgaged property. *Perianna v. Marudainaygam* (1899), 22 Mad., 332; 9 M. L. J., 166. An usufructuary mortgagee, however, is entitled to retain possession until the amount paid by him in satisfaction of a decree for sale on a prior mortgage as well as the amount due in respect of his own mortgage have been realised. *Abdul v. Sadr-ud-din* (1904), 27 All., 403; 2 A. L. J., 23; *Muhammad v. Sheodardshan* (1907), 4 A. L. J., 176. Where mortgagee is not in possession. See pp. 304, 305, 541, *ante*.

Where the property is by its nature insurable, &c.—See 44 Insurance by mortgagees.
 & 45 Vict., c. 41, sec. 19, sub-sections (i), (ii). “Any building or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property.” The mode in which the insurance money is to be applied is dealt with in sec. 76, *post*. It should be noticed that there is no provision in the Act requiring a mortgagor, who keeps up an insurance where the property is not insured at the date of the mortgage, to apply the money either in reinstating the property or in reducing or discharging the mortgage-debt. Cf. sec. 23 (3) and (4) of the English Conveyancing Act, 1881; and see Hood and Challis, pp. 76-8. Even a covenant to insure contained in the mortgage-deed was not previously enough, in the absence of a stipulation that the policy-moneys should be so applied: *Lees v. Whiteley* (1866), 2 Eq., 143; which was approved by a majority of the court of appeal in *Rayner v. Preston* (1881), 18 Ch. D., 1. Cf. sec. 951 of Civil Code of Italy. On the other hand, an unauthorised insurance by the mortgagee will not enure to the benefit of the mortgagor, who cannot, therefore, require the money payable on the policy, in case the property is destroyed, to be laid out in restoring the premises. See p. 545, *ante*. Cf. *Ex Parte, Andrews* (1813), 2 Rose, 410; *Phillips v. Eastwood* (1835), Ll. & Gt. Sugden, 289. See also an article on Insurance of Limited Interests in 10 L. Q. R., p. 48.

Charge on the mortgaged property, &c.—The words ‘charge on the mortgaged property in addition to the principal money with the same priority’ occur only in connection with the payment of premiums. Premiums: Charge on the mortgaged property.
 The explanation of this is, perhaps, to be found in the fact that the latter provision reproduces almost word for word sec. 19 (ii) of the English Conveyancing Act, 1881. This would also account for the omission of the words ‘and where no such rate is fixed at the rate of nine per cent. per annum,’ which are to be found in the earlier part of the section. It would seem from the wording of the clause that if insurable and non-insurable properties are mortgaged together, the mortgagee can only claim a charge on the former.

Insurances by successive Mortgagees.—Payment to a first incumbrancer of a sum which does not represent the difference between the insurable value of the mortgaged premises and their value after deterioration by fire, though sufficient to reinstate them will not prevent a puisne incumbrancer from recovering against his own insurers for loss sustained by him, if the money paid to the first incumbrancer is not expended on reinstatement. *Westminster, &c., Office v. Glasgow, &c., Society* (1888), 13 A. C., 699. Right of puisne mortgagees as regards insurance.

Charge on
proceeds of
revenue-sale.

73. Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part.

Mortgagee's
right on con-
version of
security into
money.

The section is not very carefully worded, but it evidently applies only to cases in which the sale has the effect of sweeping away all incumbrances, it being an established rule that a mortgagee will be entitled for the purpose of the security to all such interests as may be acquired in place of the mortgagor's interest. See pp. 273, 274, *ante*; cf. 57 and 58 Vict., c. 47, sec. 21 (c); *disting.* *Rajagopal v. Subbaraya* (1883), 7 Mad., 31; *Padakannaya v. Narasimma* (1886), 10 Mad., 266; *Koonjbehary v. Shibsahun* (1862), 1 Hay, 466. The moment a mortgaged property is transformed into money by reason of a revenue-sale the lien fastens by operation of law upon the surplus sale-proceeds. *Gopikrishna v. Ram* (1910), 12 C. L. J., 468; 14 C. W. N., 484. Cf. *Aziran v. Kasiman* (1909), 10 C. L. J., 488, where an agreement with regard to the surplus sale-proceeds was held not to nullify the personal covenant in the deed. See also *Mastulla v. Jan Mahomed* (1900), 28 Cal., 12; *Hem v. Tajazzal* (1904), 8 C. W. N., 332; and *Susila bala v. Dinabandhu* (1909), 14 C. W. N., 186, where the mortgagee himself had purchased at the sale. So long as the purchaser at the sale retains the power to annul all incumbrances, the lien of the mortgagee is in jeopardy, and in such a case the mortgagee may abandon his lien on the property and ask to have it transferred to the surplus sale-proceeds. *Nim Chand v. Ashutosh* (1904), 9 C. W. N., 117. For a case where this section was interpreted literally and the mortgagee was held entitled to a charge on the sale-proceeds irrespective of the question whether the sale would sweep away the mortgage or not, see *Gobind v. Sibdu* (1906), 33 Cal., 878. Where the revenue-sale of an estate was made subject to a *putni* created subsequently to the mortgage, the mortgagee who had obtained a decree for sale against the mortgagor and the *putnidar* and had purchased the estate at the revenue-sale, was held entitled to sell the *putni* for the balance of his mortgage-money not satisfied out of the surplus sale-proceeds. *Susilabala v. Dinabandhu* (1909), 14 C. W. N., 186. See the general principle discussed, pp. 291-294, *ante*; cf. *Hur-Deo v. Fuzla* (1864), 1 W. R., 270. For the distinction between rights acquired by a purchaser under sec. 53 and those acquired by one under sec. 54 of Act XI of 1859, see *Jogessur v. Khetter* (1889), 17 Cal., 148. *Har-*

shankar v. Shew (1899), 26 Cal., 966. The principle which underlies this section would also entitle the mortgagee to claim a charge on the purchase-money where the land has been acquired under the Land Acquisition Act. See p. 273, *ante*; see also *Venkatta v. Krishna* (1882), 6 Mad., 344; *Debendra v. Mirza Abdul* (1909), 10 C. L. J., 150. But it seems that if the mortgagee does not claim any part of the compensation-money in response to the notification under the Act, he cannot treat the amount of compensation in the hands of the Collector as part of his security, *Basamal v. Tajammal* (1893), 16 All., 73. On a sale of the mortgaged property in execution of a decree obtained by a prior mortgagee when the puisne incumbrancers were parties to the suit, the rights of the puisne incumbrancers are transferred by the sale to the surplus sale-proceeds. *Berham Deo v. Tara* (1905), 33 Cal., 92; 9 C. W. N., 989.

Damages for injury to mortgaged premises.—See p. 280, *ante*; see also *Aiyappa v. Kuppusami* (1904), 28 Mad., 208. For the Roman law on the subject, see Kelleher, 49; cf. Art. 1951, Civil Code of Italy.

The principle underlying this section is applicable to a case where the amount due under a decree which has been mortgaged is subsequently realised in execution. *Venkatarama v. Esumsa* (1909), 33 Mad., 429; 20 M. L. J., 330; dissenting from *Singaravelu v. Ramayer* (1903), 13 M. L. J., 306. As to the effect of a subsequent partition on the security of an undivided interest, see pp. 291-294, 472, *ante*. A mortgagee of an undivided share is only entitled to proceed against the substituted property which falls to the share of his mortgagor on partition, unless the partition has been unfair or in fraud of the mortgagee. *Muthia v. Appala* (1910), 34 Mad., 175; 20 M. L. J., 393.

Limitation.—A suit to recover surplus proceeds is substantially a suit to enforce a charge upon the land. *Kamalakant v. Abulbarkat* (1899), 27 Cal., 180; *Jogeshur v. Ghanashyam* (1897), 5 C. W. N., 356; *Berham Deo v. Tara* (1905), 33 Cal., 92; 9 C. W. N., 989; *disting.* *Shyam v. Land Mortgage Bank* (1883), 12 C. L. R., 440.

74. Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt,

Where property acquired under the Land Acquisition Act.

Substituted security.

Right of subsequent mortgagee to pay off prior mortgagee.

acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.

Redemption
by puisne
mortgagee.

Right of Puisne Mortgagee to pay off prior Mortgagee.—

This section, which must be read with sec. 80, only deals with the rights of a subsequent mortgagee as against the next prior mortgagee, while the next section deals with the rights of subsequent mortgagees against prior mortgagees generally. Though the section makes mention only of 'the next prior mortgagee' it does not follow that a puisne mortgagee is disabled from redeeming a prior mortgage when there are intervening puisne mortgagees. See pp. 240-242, *ante*. If the next prior mortgagee does not accept the tender, the only remedy is to sue him for redemption. In this view, it is not quite easy to discover the utility of this section.

Notice not necessary before Tender.—It is to be noticed that the last paragraph but one of sec. 60, has not been incorporated in this section.

Receipt for the mortgage-money.—Compare the provisions of the Building Society's Act, 1874, sec. 42; the Industrial and Provident Society's Act, 1893; and the Friendly Society's Act, 1896.

Where puisne
mortgagee
may sue.

Where puisne mortgagee is bound to proceed by way of execution.—It has been held in a Madras case that any rights which may be acquired by a puisne incumbrancer who pays off a decree on a prior mortgage can only be enforced by process of execution and not by way of action. *Bavanna v. Bala* (1899), 9 M. L. J., 177. Where, however, the decree did not provide for the exercise by the puisne incumbrancers of their successive rights of redemption or for working out the rights of the parties in the event of the puisne incumbrancer redeeming the property, a subsequent suit may be brought. *Gopi v. Bansidhar* (1905), 32 I. A., 123; 27 All., 325. An appropriate form of decree in use in England is given in Seton, p. 1979. See also Forms No. 6 and No. 7 in the first Schedule, Appendix D of the Civil Procedure Code.

Puisne mort-
gagee may
retain posses-
sion.

Where puisne mortgagee is not bound to sue.—An usufructuary mortgagee who satisfies a decree for sale on a prior mortgage is entitled to retain possession until the amount so paid as well as his own mortgage have been realised. *Abdul v. Sadrud-din* (1904), 27 All., 403; *Muhammad v. Sheedarshan* (1907), 4 A. L. J., 176. And a person who pays off an usufructuary mortgage is entitled to remain in possession for the satisfaction of the debt due to him, and is not bound to bring any action for the money. *Fyezoolah v. Kazim* (1870), 14 W. R., 29. A subsequent mortgagee is, however, bound to join any

claim that he may have against the mortgaged property by reason of his having paid off a prior mortgage-debt in a suit to enforce his original mortgage. *Hari v. Kusum* (1910), 37 Cal., 589; 11 C. L. J., 551; and if he does not insist upon his rights when the mortgagor seeks to redeem him, he will not afterwards be permitted to bring a separate action for the money. *Bavanna v. Bala* (1899), *supra*.

Subrogation where mortgage is paid off with money advanced by third person.—See pp. 332-342, *ante*; cf. *Bhima v. Bhiwa* (1888), Bom. P. J., 245; *Ranu v. Kedar* (1894), Bom. P. J., 93; *Raoji v. Narayan* (1896), Bom. P. J., 629; *Amar v. Goloke* (1898), 4 C. W. N., 769; but see *Venkatesh v. Linga* (1883), Bom. P. J., 362; *Dhapi v. Barham* (1899), 4 C. W. N., 297, 303. See also Kelleher, p. 107. So where there is a subsisting charge on certain property which is paid off by the person in possession, it is equitable that when the plaintiff reclaims the estate, credit should be given to that person for the payment of the mortgage which the plaintiff would have had to meet. *Ashidbai v. Abdulla* (1906), 31 Bom., 271. Where money received from a third person by executing a mortgage was used in paying off a prior mortgage-decree and the instrument recited the necessity for paying off the decree and the fact of its payment, and while actually mentioning one mesne mortgage falsely stated that the property was otherwise free from incumbrances, the subsequent mortgagee was held to have priority over the mesne mortgagees on the principle of subrogation. *Tara Sundari v. Khedan* (1910), 14 C. W. N., 1089. For a case of subrogation where a mortgage on property belonging to the wife was paid off by a person at the request of the husband who believed it to belong to the husband, though the wife did not make any request for the payment, nor knew anything of the transaction, see *Butler v. Rice* (1910), 2 Ch., 277, where Warrington, J., held that the question was whether the person paying off the mortgage was entitled to treat it as still on foot in his favour and that on such a question the concurrence of the mortgagor was immaterial. Cf. *Narayana v. Pechiammal* (1911), 22 M. L. J., 364.

Rights of puisne mortgagee.—“There is no provision in the Transfer of Property Act to support the proposition that a second mortgagee may, by a transaction between himself and the first mortgagee, without knowledge and concurrence on the part of the mortgagor, acquire a new right over the mortgaged property.” *Per* Shephard, J., in *Perianna v. Marudainayadam* (1899), 22 Mad., 332. But where a puisne mortgagee pays off a prior mortgage, he is entitled to hold up the amount of that mortgage as a shield against a claim to redeem only the subsequent mortgage. *Kirat v. Debi* (1904), 27 All., 306.

Subrogation
by third
person.

Where puisne
mortgagee
pays off prior
mortgagee.

Where the amount realised by the sale of the mortgaged property is not sufficient to cover the amounts due on the prior, as well as subsequent incumbrances, the puisne mortgagee who has paid off a prior mortgage is entitled to a decree under sec. 90 (Code of Civil Procedure, O. 34, r. 6), with respect to the deficit on the mortgages having regard to the provisions of sec. 65. *Ali Jan v. Mariam* (1903), 26 All., 93.

English law as to the rights of puisne mortgagee.

In the English law, a subsequent mortgagee may throw his own debt on all the properties, comprised in the first mortgage, and he may do this, even if the mortgagor was not the owner of some of the properties when the subsequent mortgage was executed. See pp. 356-358, *ante*; cf. *Tilley v. Davies* (1743), 2 Y. & C., 399; *Sober v. Kemp* (1847), 6 Hare, 155, 160. For other cases under this section. See *Sirbadh v. Raghunath* (1885), 7 All., 568, 574; *Koopmia v. Chidambaram* (1895), 19 Mad., 105.

Rights of purchaser.—See p. 349, *ante*. A purchaser of the equity of redemption paying off a prior mortgage can resist an action for sale by the second mortgagee, unless the latter redeems the first mortgage which the purchaser must be taken to have intended to keep alive for his benefit. *Mamraj v. Ramji* (1909), 7 A. L. J., 15. In order to establish a right by subrogation of a purchaser it is not necessary for him to prove any express intention or agreement to subrogate and it may be presumed from the circumstances. *Prayag v. Chedi* (1910), 14 C. W. N., 1093n. The purchaser is entitled to interest on the footing of the mortgage paid off by him, but he cannot be allowed to retain the profits at the same time. *Satnarain v. Sheobaran* (1911), 14 C. L. J., 500. Where a puisne mortgagee paid off a prior mortgage and brought the property to sale in satisfaction of his own mortgage, it was held that the purchaser at such sale is entitled to hold up as a shield the first mortgage, which was satisfied by the puisne incumbrancer, against the second mortgagee in a suit for sale by the second mortgagee on his mortgage. *Mati-Ullah v. Banwari* (1909), 32 All., 138; 7 A. L. J., 61. But where a purchaser undertakes to pay off two subsisting mortgages with the purchase-money, but discharges only the first mortgage, he cannot as against the subsequent mortgagee claim to stand in the shoes of the prior mortgagee. In order to sustain a claim for subrogation, the prior mortgage must be discharged entirely. *Hanumanthaiyan v. Meenatchi* (1910), 35 Mad., 183.

Subrogation by purchaser.

The rule as to subrogation only applies where the purchaser has not covenanted to discharge the previous incumbrance. *Govindasami v. Dorasami* (1910), 34 Mad., 119; *Muhammad v. Ghaus* (1910), 33 All., 101; 7 A. L. J., 914. And a person simply performing his own obligation or covenant cannot claim subrogation. *Satnarain v. Sheobaran* (1911), 14 C. L. J., 500. Subrogation has

Person performing his obligation cannot claim subrogation.

also been disallowed, where a prior mortgage was discharged by the money advanced by a second mortgagee when the interest of a third person, who was no party to the second mortgage, was also bound by the prior mortgage and there was no express intention to keep alive the discharged mortgage. *Kalagayya v. Yanadamma* (1910), 21 M. L. J., 180.

Subrogation of purchaser whose purchase is found invalid.—See p. 349, *ante*. See also *Chama Swami v. Padala* (1908), 31 Mad., 439.

It has been held that this section does not enable the mortgagor to acquire the rights of the prior mortgagee by obtaining a receipt for payment of the prior mortgage-debt. Where the mortgagee took from his mortgagor a transfer of the entire mortgaged property in satisfaction of the mortgage-debt, it was held that the mortgagee could not claim any right as mortgagee to the portion of the mortgaged property which before the transfer to him had been conveyed by the mortgagor to a third person. *Ponnamal v. Kalikitha* (1910), 34 Mad., 115.

Mortgagor paying off prior mortgage.

75. Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.

Rights of mesne mortgagee against prior and subsequent mortgagees.

See pp. 241, 242, 269, 348, *ante*.

This section must be read with O. 34, r. 11 of the Civil Procedure Code which embodies the principle that a puisne mortgagee may redeem up and foreclose down. The rule refers to foreclosure only and not to sale. A puisne incumbrancer may bring a suit for foreclosure or sale on his own mortgage without seeking to redeem a prior mortgage. See pp. 586, 623, 624, *ante*; and O. 34, r. 1, *post*. Redemption is a right which a second mortgagee may seek to enforce; it is not a liability which he may be compelled to discharge. *Mulla Vittel v. Korambath* (1911), 21 M. L. J., 213. The prior mortgagee has the right to require a subsequent mortgagee to redeem him or submit to a sale of whatever interest he has in the mortgaged property. *Canagayam v. Gompertz* (1908), 31 Mad., 425. But a subsequent mortgagee cannot sue to redeem the prior mortgages without foreclosing on his own mortgage against the subsequent mortgagees as well as the mortgagor. See p. 241, *ante*. *R. and L.* brought a suit for foreclosure on a mortgage,

Puisne mortgagee's right of foreclosure and redemption.

R holding a puisne mortgage on the same property. After foreclosure *R* brought a suit on his own mortgage for foreclosure of half the property in possession of *L* offering to redeem the prior mortgage. It was held that *R* being a party to the previous suit for foreclosure his right of redemption was extinguished and that the suit was not maintainable. *Ram v. Lakhpai* (1906), 3 A. L. J., 240.

* Liabilities of mortgagee in possession.

76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

- (a) he must manage the property as a person of ordinary prudence would manage it if it were his own ;
- (b) he must use his best endeavours to collect the rents and profits thereof ;
- (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature accruing due in respect thereof during such possession and any arrears of rent in default of payment of which the property may be summarily sold ;
- (d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money ;
- (e) he must not commit any act which is destructive or permanently injurious to the property ;
- (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the

mortgagor so directs, in reduction or discharge of the mortgage-money ;

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ;

(h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money ; the surplus, if any, shall be paid to the mortgagor ;

(i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this

Loss occasioned by his default.

chapter, be debited with the loss, if any, occasioned by such failure.

Duties of mortgagee in possession.

Mortgagee accounts as mortgagee in possession.—

See pp. 521-525, *ante*, and cf. *Faulkner v. Daniel* (1843), 3 Hare, 199, 220; *Bertrand v. Davies* (1862), 31 Beav., 440. A mortgagee in possession under an invalid contract to buy is also liable to be treated as a mortgagee in possession. *Robertson v. Norris* (1858), 1 Giff., 421. For the liability of grantee of mortgagee's interest in confiscated land, see *Mahomed v. Sookh* (1867), 2 Agra, 116.

Management of the property.

Must manage the property, &c.—See pp. 527-530, *ante*. See also *Deonarain v. Naek* (1870), 2 N.-W. P., 217; cf. *National Bank of Australasia v. United, &c., Co.* (1879), 4 App. Cas., 391, 409, also *Dada v. Dhondo* (1887), Bom. P. J., 124; cf. sec. 151, Contract Act.

Collection of the rents and profits.

Must use his best endeavours, &c.—See pp. 531-537, *ante*. Payments agreed to be made by the actual occupier of the soil, under a license to dig earth and make bricks, are in the nature of rent. *Hankey, Ex parte* (1828), Mont. & M'Ar., 247. Right to bygone rents as against bankrupt mortgagor's assignee, see *Calwell, Ex parte* (1829), 7 Moll., 259; disting. *Carr, Ex parte* (1842), 2 Mont. D. and D., 534; see also p. 203, *ante*. It should be noticed that in the English Law the position of a tenant under a tenancy created after the mortgage is very peculiar. It is true so long as the mortgagor is allowed to remain in possession, he may safely pay his rent to him. But the tenant is liable to be evicted by the mortgagee at any time; while he is estopped from disputing the title of the mortgagor, if the latter should call upon him to pay his rent. He can thus only save himself by giving up possession to the mortgagee and attorning tenant to him which is regarded as an eviction by title paramount. But the mortgagee, if he has not been in actual possession, cannot maintain an action for mesne profits against a tenant, who has come in after the mortgage. *Turner v. Cameron's &c., Co.*, (1850), 5 Exch., 932; *Litchfield v. Ready* (1850), 5 Exch., 939.

Payment of public charges.

Must in the absence of a contract to the contrary out of the income of the property pay the Government revenue, &c.—See p. 538, *ante*; cf. Arts. 1892, 1893, Civil Code of Italy. Dr. Whitley Stokes thinks that the word 'and' has been inadvertently dropped after the words 'Government revenue.' This, it may be noticed, is not the only instance of inadvertence in the draftsman; for, as the clause stands, the mortgagee would be bound to pay arrears of rent due at the time of his taking possession. As a set-off, however, he is not bound to pay any rent which may accrue due subsequently. Then, again, it is not quite clear what is meant by the extremely vague term

'charges of a public nature.' Nor is it clear that the word 'rent' would include collateral sums payable to the landlord. In England a sub-lessee, by way of mortgage, comes under no liability to the original lessor either for payment of rent or for performance of covenants in the original lease, and entry into possession of the sub-term does not make the sub-lessee liable to the lessor. Thus, where the assignee of a lease mortgaged the premises by way of sub-demise, it was held that the original lessee could not sue the mortgagee to recover rents, which he had been compelled to pay to the lessor, though the mortgage provided that the mortgagee should, if he entered into possession, in the first place pay the rent reserved by the original lease out of the rents and profits and the mortgagee did not pay the rent which accrued due while he was in possession. *Bonner v. Tottenham, &c., Society* (1899), 1 Q. B., 161.

Liability of sub-lessee under English law.

Where the mortgagee of two properties was bound to pay the enhanced revenue and it was provided that any amount paid by the mortgagee as enhanced revenue was to be deducted from the *malikhana* payable to the mortgagor, the mortgagee cannot tack on to the mortgage-debt as against the purchaser of one of the properties the amount of enhanced revenue paid on account of the other which he had omitted to deduct from the *malikhana* paid to the mortgagor, after the latter property was sold in satisfaction of a prior mortgage. *Bohra Thakur v. Collector of Aligarh* (1910), 37 I. A., 182; 32 All., 612.

He must in the absence of a contract to the contrary make such necessary repairs, &c.—See p. 539, *ante*. The mortgagee is not bound, either under this or the preceding clause, to pay any money out of his own pocket. It follows that where the whole profits are to be taken in lieu of interest, the mortgagee is under no obligation to make any repairs. Disting. *Shivadevi v. Jaru* (1891), 15 Mad., 290.

Necessary repairs.

He must not commit any act, &c.—See p. 528, *ante*; cf. Waste. *Farrant v. Lovel* (1750), 3 Atk., 722. The mortgagee is bound not only to abstain from committing waste, but also to restrain others from doing so. *Lachmi v. Jethumal* (1894), 16 All., 386; but see Macpherson, 282; disting. *Baquer v. Nisar* (1889), 5 A. W. N., 262; see also *Amrat v. Lallu* (1898), Bom. P. J., 373. But a mortgagee of a forest is entitled to cut down trees for sale in the customary manner. *Pandurang v. Vishnu* (1888), Bom. P. J., 161. "A mortgagor is entitled to recover damages from his mortgagee and also from a sub-mortgagee or any other person, who has joined in the act complained of, for injury caused to the property by the acts of the mortgagee and others during the time of their being in possession. So he may recover damages for waste committed;—as by the improper cutting down of

trees. But those only are liable in damages who have been guilty of the wrong for which redress is sought ; and therefore a sub-mortgagee is not liable for damage caused before his entry." Macpherson, p. 282.

Insurance.

Where he has insured, &c.—See the notes to secs. 49 and 72.

He must keep clear, full and accurate accounts, &c.—See pp. 539-540, *ante*. As to when the mortgagee may be called upon to account ; see p. 561, *ante*.

Mode of
accounting.

His receipts from the mortgaged property, &c., shall be debited against him, &c.—See pp. 561-568, *ante*. Where the mortgagee under a zuripeshgi lease does not pay the agreed rent, the mortgagor may debit it in the accounts to the mortgagee and no question of limitation can arise. See p. 568, *ante* ; cf. *Ram v. Madhab* (1864), 1 W. R., 144.

Mortgagee's
right to
standing
crops.

When mortgagee accounts for gross receipts.—See p. 546, *ante*. See also *Asima v. Ahmudee*, S. D. A., N.-W. P., 1854, p. 1 ; *Raghunath v. Sadashiv* (1886), Bom. P. J., 256. Cl. (i) does not expressly provide for the mortgagee paying interest on the gross receipts ; but see p. 564, *ante* ; cf. *Bechoo v. Sheo* (1869), 1 N.-W. P., 111. But a mortgagee in possession against whom a decree for redemption has been made is entitled to reap a crop standing on the land. Where, therefore, a mortgagor is put into possession before the mortgagee can reap it, he is entitled to re-possession on his returning the money paid to him, and if before he can be so reinstated the mortgagor has reaped the crop, he will be entitled to the value of it. *Balaji v. Taty* (1887), Bom. P. J., 114. A mortgagee in possession of business premises is entitled to carry on business for a reasonable time so as to enable him to sell the thing as a going concern, and for that purpose to use the name of the mortgagor's firm. *Cook v. Thomas* (1876), 24 W. R. (Eng.), 427.

Mortgagee in possession not entitled to pay rents to mortgagor after notice of another incumbrance.—See pp. 536-538, *ante* ; see also *Chapman v. Tanner* (1684), 1 Vern., 266, where the mortgagee was charged with the profits, because he was guilty of fencing with his mortgage against the assignees of the mortgagor who had become bankrupt.

Liability of mortgagee who fails to perform his duties.—

See pp. 540-541, *ante* ; cf. *Jaffree v. Ujbee* (1868), 3 Agra, 153. The mortgagee may also forfeit his right to costs ; *Kullyan v. Sheo Nundun* (1872), 18 W. R., 65 ; see also the notes to sec. 92, *post*. The liability of a mortgagee in possession does not terminate with the decree. *Taylor v. Mostyn* (1886), 33 Ch. D., 226. For the liability of a Malabar

Termination
of mortgagee's
liability.

mortgagee in possession, see notes to sec. 98, *post*. The mortgagee will not, however, be liable, if the default, though nominally made by him, is in reality that of the mortgagor. Macpherson, p. 574.

Limitation.—A claim for damages in respect of trees cut down by a mortgagee in possession is governed by art. 36 of the Limitation Act (XV of 1877). The liability of the mortgagee on being paid the debt due to him to put the mortgagor into possession of the property is, however, in the nature of a continuing obligation which cannot be said to cease so long as the mortgagor's right to redeem is not barred. Arts. 115 and 116, read with sec. 23 of the Act would apply to a claim by the mortgagor for damages in respect of mortgaged property sold on account of the mortgagee's default to pay arrears of revenue. *Sivachidambara v. Kamatchi* (1909), 33 Mad., 71. Limitation.

His receipts from the mortgaged property, &c., Cl. (h).—Where a mortgagee in possession pays rent to the ground landlord, he is to be allowed such rent in account, but not after he has purchased the reversion. *Brandon v. Brandon* (1862), 10 W. R. (Eng.), 287; cf. *Doolu v. Damodur* (1865), 3 W. R., 162. The clause under notice which, by the way, is rather out of place in this section must be read with the provisions of sec. 72 under which the payments of the mortgagee are treated not as outgoings, but as accretions to the principal money; though it is difficult to see why money spent for the due management of the property or the collection of the rents should not be treated as outgoings in the same way as payments mentioned in clauses (c) and (d) of the present section. This is not mere verbal criticism; for while no receipts can be carried to the debit of the mortgage without deducting the last-mentioned payments, the mortgagee may have to wait for the repayment of moneys spent by him under sec. 72, till the principal money becomes due. Clauses (d) and (h) do not also fall in with one another, for the repairs are only to be made out of the net income after deducting the interest. For forms of order directing accounts against a mortgagee in possession, see Seton, p. 1956, No. 1; for accounts with rests, *Ibid*, pp. 1956, 1957, Nos. 2, 3; accounts of rents and repairs, and lasting improvements, *Ibid*, p. 1957, No. 4; and see *Houghton v. Sevenoaks Estate Co.* (1885), 33 W. R. (Eng.), 341. For form of account, see Daniell C. F., 772. Whether payments should be treated as outgoings.

Receipts, Income, Rents and Profits.—It should be noticed that these words are used in this section indifferently to denote the same thing, in violation of one of the most elementary rules of draftsmanship. 'Mortgage-money' also seems to be employed for principal money.

Receipts
in lieu of
interest.

77. Nothing in section 76, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

A contract between the mortgagee and the mortgagor that the receipts, &c.—Where all that appears is a loan and a delivery of possession of land as security, no condition for an account can be engrafted on the transaction; and the mortgagor will only be permitted to redeem on payment of the principal sum. *Mahadu v. Bagirathibai* (1877), Bom. P. J., 169; disting. *Babaji v. Taty* (1889), Bom. P. J., 18. When an usufructuary mortgagee collected cesses from tenants which were realisable under a Statute subsequent to the mortgage and only by the mortgagor proprietor, the mortgagor was held entitled to credit for the sums so realised, although the parties did not intend that any account should be taken at the time of redemption. *Ramavatar v. Tulsi* (1911), 14 C. L. J., 507. It should be noticed that though a mortgagee in possession who has not to account for rents and profits under the terms of the mortgage cannot claim for necessary repairs, he may be entitled to be repaid money expended in protecting the estate, as, for instance, constructing a new embankment. *Faki v. Umabai* (1884), Bom. P. J., 9.

Priority.

Postponement
of prior
mortgagee.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Determination
of priority.

Rules for determining priority.—See pp. 379—389, *ante*. See also Kelleher, 24, 82, 83, 107, 113, 121, 123—132. It should be noticed that a mortgage 'subject to prior incumbrances' will not include a prior charge, where it was unknown to the mortgagee and it does not appear to have been the intention of the mortgagor to include it. *Greenwood v. Churchill* (1843), 6 Beav., 314. Where the consideration of a security is a debt due under a previous mortgage, the mortgagee is entitled to priority over a mesne mortgagee to the extent of

the sum covered by the earlier security, on the ground that at the time of taking the later mortgage he must have intended to keep on foot the earlier mortgage. *Debendra v. Mirza Abdul* (1909), 10 C. L. J., 150. So also where a mortgage was executed to secure a prior mortgage decree it was held entitled to priority over a mortgage executed subsequent to the decree. *Rahim-un-nissa v. Badri* (1911), 33 All., 368; 8 A. L. J., 112; citing *Kanhaya v. Chhida* (1910), 7 A. L. J., 985. A purchaser under a registered deed is entitled to priority over a purchaser at a sale in execution of a decree on an anterior unregistered mortgage, if the purchase was without notice of the mortgage. *Sarat v. Meher* (1906), 4 C. L. J., 490; *Ram v. Bachcha* (1912), 10 A. L. J., 114; even where the deed of sale was by a second mortgagee who had purchased the property in execution of his own mortgage-decree. *Ishri v. Gopi* (1912), 10 A. L. J. 222.

Creation of new debt.—S, who had a mortgage for 4,000*l.* forgave the mortgagor 800*l.*, and three years afterwards lent him 800*l.* again; during the intervening time, a mortgage was made to J for 2,000*l.* on the same estate. It was held that the loan of 800*l.* could not be considered as a continuance of the old mortgage, as against an intervening incumbrance. *Shepherd v. Telley* (1742), 2 Atk., 350. As to contributory mortgages see pp. 389-391, *ante*, and see the case of *Stokes v. Prance* (1898), 1 Ch., 212, where it was held that the ordinary rule that the mortgagees rank equally will not be displaced by the use of the word residue. It was also held that a personal guarantee given by one of the contributory mortgagees to the other could not prevent the assignees of the former from helping themselves out of the fund, though it was admittedly insufficient. Disting. *Middleton v. Pollock* (1876), 4 Ch. D., 49.

Sub-mortgages.—If the security proves deficient, the sub-mortgagee will be entitled to priority in respect of the amount advanced by him. *Berridge, Exp.* (1842), 3 Mont. D. & D., 464; 7 Jur., 1141.

Mortgage-debentures.—See pp. 392-394, *ante*. As to the priority of debenture-holders over assignees of rents in arrears with regard to properties specifically mortgaged and also with regard to other properties not specifically charged, see *In re Inde Coope & Co., Ltd.* (1911), 2 Ch., 223.

Priorities—Several notes secured by same mortgage.—A, the owner of several notes secured by a trust deed, payable two and three years after date, assigned one of the two-year notes to B, and one of the three-year notes to C. The trust-deed contained the provision that on default in payment of any of the notes, all should become due. After maturity of all the

Rules for
determining
priority.

Where new
loan not con-
sidered as a
continuance of
old debt.

Priority in
case of severa.
notes.

Rule in
America for
determining
priority of
several notes.

notes, a bill was filed to foreclose the trust-deed. It was held, that all of the two-year notes should be paid first, then the three-year note assigned to C, and then the three-year notes retained by A. *Kuppenheimer v. Chicago Title and Trust Co.* (1911), 43 Nat. Corp., Rep. 467 (Ill., App. Ct.) In many jurisdictions in America the various assignees of notes secured by the same mortgage and maturing at different dates share *pro rata* in a distribution of the security, irrespective of the order of maturity or assignment of their respective notes. *Douley v. Hays*, 17 Serg. & R. (Pa.), 400; *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W., 907. But in one jurisdiction at least such assignees take priority in the order of assignment. *Kullum v. Erwin*, 4 Ala., 452; *Alabama Gold Life Ins. Co. v. Hall*, 58 Ala., 1. A large number of jurisdictions, however, hold that priority shall be determined by the order of maturity of the various notes. *Lyman v. Smith*, 21 Wis., 674; *Winters v. Franklin Bank of Cincinnati*, 33 Oh. St., 250. Nor is this order affected by the presence of an acceleration clause in the mortgage. *Leavitt v. Reynolds*, 79 Ia., 348; *Horn v. Bennett*, 135 Ind., 158, 34 N. E., 321. Contra, *Pierce v. Shaw*, 51 Wis., 316, 8 N. W., 209. This view would seem preferable as giving effect to the probable intention of the parties that by a prior date of maturity, which carries with it, in the absence of an acceleration clause at least, a prior right to foreclose, a party is to be entitled to a preference. The assignee, however, is usually allowed to prevail over the assignor irrespective of the order of maturity. *Parkhurst v. Watertown Steam Engine Co.*, 107 Ind., 594, 8 N. E., 635; *Anderson v. Sharp*, 44 Oh. St., 260, 6 N. E., 900. Contra, *Wood v. Trask*, 7 Wis., 566. See 25 Harvard Law Review, p. 392.

Mortgage with possession in the Konkan.—See pp. 410-411, *ante*. *Anunt v. Arjun* (1880), Bom. P. J., 293; *Wamanji v. Amba* (1881), Bom. P. J., 117; *Naro v. Balaji* (1880), Bom. P. J., 303. Disting. *Hari Ramchundra v. Mahadaji* (1867), 8 Bom. H. C., 50. But if the mortgagor remains in possession as tenant under the mortgagee, the latter will be treated as having taken possession. *Anunt v. Arjun*, *Supra*; *Wamanji v. Amba*, *supra*; *Shival v. Naro* (1882), Bom. P. J., 191.

Priority lost by fraud or misrepresentation.—See pp. 416-418, *ante*. Cf. *Draper v. Borlace* (1699), 2 Vern., 369. Disting. *Ibbotson v. Rodes* (1706) 2 Vern., 554; *Faithful v. Ewen* (1878), 7 Ch. D., 495; *Macfarlane v. Lister* (1887), 37 Ch. D., 88; *Gheran v. Kunj* (1887), 9 All., 413. A prior mortgagee having concurred in inducing the subsequent mortgagees to advance their money as a first charge cannot afterwards turn round and claim priority over that charge in favour of his own earlier mortgage. *Raman v. Steel Brothers* (1911), 39 I. A.; 14 C. L. J., 79; 15 C. W. N.,

How priority
may be lost.

813. Upon the treaty for a mortgage of an estate, a person who was entitled to be recouped out of the estate, in case a certain income was levied out of his own estate, was in communication with the mortgagee upon the subject of the mortgage, but did not inform him of his equitable claim, it was held that he could not afterwards set up his claim against the mortgagee. *Boyd v. Belton* (1844), 1 Jo. & Lat., 730. But mere omission to comply with the provisions of a Statute will not in the absence of fraud or negligence affect a security which is otherwise valid. It used to be thought at one time that a director or officer of a limited company advancing money on the security of a debenture or mortgage made by the company and omitting to register it could not acquire a valid charge against the creditors. But it is now settled that it is neither justice nor equity to inflict a forfeiture which the Statute does not impose in addition to the penalty which it does. *Wright v. Horton* (1887), 12 App. Cas., 371.

Priority lost by gross neglect.—See pp. 419-435, *ante*. It is not gross negligence to allow a trustee in whose name a mortgage has been taken, part of the money belonging to the wife of the trustee, to hold the mortgage-deed. *Stockhouse v. Countess of Jersey* (1861), 1 J. & H., 721. Not asking for or improperly surrendering title-deeds. See pp. 421-425, 435, *ante*; see also *Rangasami v. Annamalai* (1907), 31 Mad., 7; 17 M. L. J., 499, where failure to obtain the title-deeds from the mortgagor was held not to amount to gross negligence under the circumstances of the case; cf. *Worthington v. Morgan* (1849), 16 Sim., 547. Omission to search the register. Pp. 432-435, 443, *ante*. Cf. *Morecock v. Dickens* (1761), Amb., 678; *Cator v. Cooley* (1750), 1 Cox., 183; *Ball v. Riversdale* (1826), Beat., 550; *Lindsay v. Gibbs* (1826), 3 DeG. & J., 690, 698; *Wisentan v. Westland* (1826), 1 Y. & J., 117; 30 R. R., 765; *O'Byrne's Estate* (1854), 15 L. R. Ir., 373.

Where one person puts it in the power of another to deceive a third person.—See pp. 426-428, *ante*. The mere omission by a person to do something which it is not his duty to do but which if done would have prevented loss to another, is not sufficient to render such person liable for such loss, nor to deprive him of any right which he would otherwise have had against that other. *Arnold v. The Cheque Bank* (1876), 1 C. P. D., 578; *Keith v. Burrows* (1876), 1 C. P. D., 722, reversed on appeal but not on this point. Cf. *Govind v. Ravuji* (1887), 12 Bom., 33.

Effect of release of prior charge.—See pp. 458-465, *ante*; cf. *Greenwood v. Churchill* (1843), 6 Beav., 1843.

When forfeiture of priority in favour of one mortgagee will enure to benefit of other mortgagees.—See p. 429, *ante*.

For the adjustment of rights where a later incumbrancer is preferred to an earlier one but not to another coming after earlier incumbrancer see p. 429, *ante*. Cf. Kelleher, p. 133.

Implied promise to indemnify.—Where a mortgagee agrees to postpone his security at the instance of the mortgagor in order to enable the latter to obtain a fresh advance, the court will infer an implied promise by the mortgagor to indemnify the mortgagee against any resulting loss. *Ex parte Ford* (1885), 16 Q. B. D., 305.

Mortgage to secure uncertain amount when maximum is expressed.

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration.

A mortgages Sultanpur to his bankers, *B & Co.*, to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to *C*, to secure Rs. 10,000, *C* having notice of the mortgage to *B & Co.*, and *C* gives notice to *B & Co.* of the second mortgage. At the date of the second mortgage, the balance due to *B & Co.* does not exceed Rs. 5,000. *B & Co.* subsequently advance to *A* sums making the balance of the account against him exceed the sum of Rs. 10,000. *B & Co.* are entitled, to the extent of Rs. 10,000, to priority over *C*.

Where security given for balance of floating account.

If the mortgage, &c., expresses the maximum to be secured thereby.—The provisions of the section will not obviously apply, where the security is given on account of the general balance of a floating account. But, as pointed out by Lord Romilly, there is no distinction in principle between such a case and one where a limit is put in. *Menzies v. Lightfoot* (1871), 11 Eq., 459, 466. The section as originally drawn was confined to mortgages made to secure running accounts and was afterwards extended to mortgages to secure further advances, and the performance of engagements by the Law Commissioners in 1879 on the ground that the proposed rule was more just than the English law on the subject. The opinion of the three Law Commissioners may not, however, be shared by the mercantile community in this country; but as the section only applies to mortgages of immovable property, they will not probably be much affected by this novel experiment in legislation.

For some remarks on this section, see pp. 394—400, *ante*. See also *Bank of Africa v. Salisbury, &c., Co.* (1892), A. C., 281; *Deeley v. Lloyds Bank* (1912) A. C., 756, reversing (1910), 1 Ch., 548. In America by the weight of authority a mortgage for future advances vests a right in the mortgagee for all advances which may be made, if they are optional, unless there is actual notice of intervening incumbrances. *Ward v. Cooke*, 17 N. J. Eq., 93. But if the advances are obligatory, actual notice will not invalidate them. *Crane v. Deming*, 7 Conn., 387. Cf. *Dalip v. Chait* (1912), 16 C. L. J., 394; *Ib.*, 16 C. L. J., 401.

80. No mortgagee paying off a prior mortgage, ^{Tacking abolished.} whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Tacking.—The doctrine of tacking, which, according to the marginal note, is abolished by the Act, does not seem to have ever found its way into our law. See pp. 401, 402, *ante*. See also *Mitthu v. Kishan* (1890), 12 All., 546; *Udaya v. Bhajahari* (1869), 11 W. R., 310; 2 B. L. R., App., 45; *Sirbadh v. Raghunath* (1885), 7 All., 568, 573.

Marshalling and Contribution.

81. If the owner of two properties mortgages them ^{Marshalling securities.} both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.

There must be two properties of a common debtor.

If the owner of two properties mortgages, &c.—See pp. 349—361, *ante*. Cf. *Lawrence v. Galsworthy* (1843), 3 Jur. (N. S.), 249. A bankrupt, to whom two estates were devised, charged with the payment of legacies, had mortgaged each of them separately, and the assignees held the estates, subject to the unpaid legacies and the mortgages. One of the estates was sold for £1,000 more than the amount of the mortgage-money with which it was charged, which surplus was sufficient to pay the legacies; but the proceeds of the other estate were scarcely sufficient to satisfy the mortgage on it. It was held on the application of the mortgagees of the last mentioned estate, that the outstanding legacies should be charged exclusively on the surplus-proceeds of the first estate. *Hartley, Exp.* (1836), 1 Deac., 288. There must be a common debtor. See pp. 358, 359, *ante*. The principle underlying the section will apply in a case where land and movables are mortgaged together to one person and the land alone is afterwards mortgaged to another. *Cornwall, In re* (1842), 6 Ir. Eq. R., 63.

Second mortgagee would include a purchaser under a decree on a second mortgage. *Inderdawan v. Gobind* (1896), 23 Cal., 790; cf. *Raoji v. Narayan* (1896), Bom. P. J., 629.

Prior mortgagee not having equal rights over both funds.

But not so as to prejudice the rights of the first mortgagee, &c.—This would exclude marshalling, where the prior mortgagee has not equal rights over both funds. Pp. 350, 351, *ante*. It has been said that the mere fact that the property which would be left as a primary security for the first mortgagee is the subject or is likely to be the subject of a claim by a third party will not affect the application of the doctrine. *Inderdawan v. Gobind* (1896), 23 Cal., 790. But there can be no doubt that as a rule marshalling cannot be enforced against the prior mortgagee, where there is any doubt of the sufficiency of the fund upon which the junior creditor has no claim; or where the prior creditor is not willing to run the risk of obtaining satisfaction out of that fund; or where that fund is of a dubious character, or is one which may involve him in litigation to realize. *Jones*, sec. 1628. See pp. 350, 352, *ante*.

Or any other person having acquired for valuable consideration, &c.—See pp. 352—354, *ante*. Cf. *Wellesley v. Mornington* (1869), 17 W. R. (Eng.), 355. A mere judgment-creditor would not come within these words. See p. 361, *ante*; see also *In re Scott's Estate* (1863), 14 Ir. Ch., 66. It should be observed that the words 'without notice' are omitted in the last part of the section.

For the rights of a surety.—See p. 358, *ante*. Where a tenant for life borrowed money to secure which he and the remainderman joined in a mortgage of the inheritance, it was held that the latter

would rank as a creditor on the assets of the former for the money and might call on the mortgagee to make the utmost of his mortgage. *Ross v. Stirling* (1816), 4 Dow., 442.

Marshalling where a person is entitled to two securities.

Where a person is entitled to two securities.

—*A* mortgages Blackacre to *B*, and gives him as a collateral security a judgment which attaches on both Blackacre and Whiteacre. Subsequently *B* assigns his debt and securities to *C*, and *A* at the same time mortgages Blackacre to *C*, for a further sum with a covenant against all incumbrances except the mortgage to *B*. It was held that *C* as against a puisne incumbrancer is entitled to be paid the debt assigned to him by *B* out of Whiteacre first, so as to leave Blackacre unimpaired to meet the second mortgage made to himself. *In re Roddy's Estate* (1861), 11 Ir. Ch., 369.

Remedy of the second mortgagee where his security is exhausted by the first—See p. 358, *ante*. It should be noticed that the subrogation is to the mortgage only and not to its rank; the effect of the subrogation being to replace the disappointed creditor in the same position which he would have occupied, if the properties comprised in the first creditor's mortgage had been proceeded against in equitable order of priority. Cf. Art. 2011, Civil Code of Italy.

82. Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Contribution to mortgage-debt.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the second mortgagee.

Contribution
to mortgage-
debt.

Where several properties, &c., are mortgaged to secure one debt.—See pp. 368—378, *ante*. This section merely refers to the liabilities of the owners of incumbered estates *inter se.*, *Roghu v. Hurlal* (1891), 18 Cal., 320; *Kuppusami v. Papathi* (1897), 21 Mad., 369. It is not very artistically worded; but the meaning is that where several estates subject to the same mortgage either originally belonged to, or subsequently become the property of different owners, and one of such owners pays off the debt, he has the right to call upon the owners of the other estates to contribute rateably to the payment of the debt, according to a valuation of the several estates, taking into account any other incumbrances affecting them respectively. The principle that each parcel of the mortgaged property is liable rateably to its value applies equally where the mortgagee himself buys the equity of redemption in one or more of such parcels, or releases any part of the security. See pp. 314-318, *ante*; cf. *Bisheshur v. Ram* (1900), 22 All., 284. A mortgagee cannot release a part of the mortgaged property and then seek to enforce his entire claim upon another portion in which third parties have become interested as assignees. *Ponnusami v. Srinivasa* (1908), 31 Mad., 333. So a mortgagee of a debt and other properties having allowed the debt to be time-barred, cannot throw the burden of the entire debt on the rest of the properties, and the holders of the mortgagor's rights in those properties, other than the mortgagor himself, can call upon the mortgagee to make an apportionment. *Isri v. Gunga* (1909), 14 C. W. N., 165. A mortgagee who has a security upon two or more properties, which he knows to belong to different persons, cannot release his lien upon one so as to increase the burden upon the others without the privity or consent of the persons affected. But this rule has no application where the effect of the release is only to diminish the mortgagee's own security and is made before any transfer by the mortgagor of any portion of the property. *Mir Eusuff v. Panchanan* (1910), 11 C. L. J., 639. See also pp. 317, 318, *ante*. Cf. *Jugal v. Kedar* (1912), 10 A. L. J., 211. So where after a mortgage of properties *A*, *B* and *C* the mortgagee and mortgagor by a registered instrument extinguished the mortgage-charge on property *A*, and subsequently the mortgagor mortgaged properties *B* and *C* to a second mortgagee, such subsequent mortgagee was held not entitled to claim that the mortgage-debt should be apportioned between *A*, *B* and *C*. *Rama v. Manak* (1905), 7 Bom. L. R., 191. But a mortgagee cannot by any act of parties entitled only to the equity of redemption, be deprived of his right to resort to any estate comprised in his mortgage so long as he has not released it and the mortgage is kept alive. *Krishna v. Bhairab* (1905), 32 Cal., 1077; 9 C. W. N., 868. See also p. 350.

Where mort-
gagee cannot
release his lien
on one of two
properties.

ante. Different properties may be mortgaged at different times to secure the same debt ; and it is immaterial that a further advance was made to the mortgagor on the occasion of the subsequent security. The only question is whether the mortgagor treated the loan as one consolidated loan. See p. 377, *ante*. In a case where a person borrowed money on a charge on certain estates and promised to give a charge on certain other estates, which promise was followed by an actual charge, it was held that he must be treated as having raised that sum rateably out of all his estates according to their respective values, after deducting the prior incumbrances upon them. *Rochejoucauld v. Bousted* (1898), 1 Ch., 550.

Different properties may be mortgaged at different times.

Before a case of contribution can arise, the several estates must have been liable to one common demand.—See p. 377, *ante*. Thus where *A*, the first mortgagee of Whiteacre, and *B*, the first mortgagee of Blackacre, joined in a mortgage of both estates and consented to give to the subsequent mortgagee priority over their respective charges ; and the lands were subsequently sold, and the subsequent mortgage was paid off out of the proceeds of sale of both properties and the surplus-proceeds of sale of Whiteacre were not sufficient to pay off the mortgage upon it ; it was held that *A* was not entitled to contribution against *B*, there not having been any common liability to pay a common demand. *Re Keily* (1858), 9 Ir. Ch. R., 87.

A grantee under a voluntary conveyance, which contained no reference to any charge and no covenants for title express or implied, was held to be under no liability to contribute, when the executors of the assignor had paid off the debt after his death, as the charge was one created by the assignor himself and not a charge paramount to his own title. *In re Darby's Estate* (1907), 2 Ch., 465. When two properties are mortgaged and one is sold in satisfaction of a prior mortgage free from the subsequent incumbrance, the whole burden of the subsequent mortgage must fall on the other property. *Bokra Thakur v. Collector of Aligarh* (1910), 37 I. A., 182 ; 32 All., 612. See also *Baldeo v. Sheo* (1906), 3 A. L. J., 441. For an instance of the mortgagee's right to a decree for apportionment of the mortgage-debt on the different parcels sold to different purchasers by the mortgagor, see *Ramnay v. Premchand* (1901), 5 C. W. N., 423.

Where no liability for contribution.

Charge.—A purchaser of a mortgaged share, who satisfies the mortgage-decree is entitled to sue for contribution according to the proportionate value of the shares and to hold the shares of the others liable to satisfy the debt under this section. *Siraj-ud-din v. Siraj-ud-din* (1905), 2 A. L. J., 698. This section is a statutory enactment in India of a principle which has long been recognised to be

founded on justice and equity. Where several properties are mortgaged to secure one debt, the owner of the property that has been made liable for more than its rateable proportion of the debt has a charge on the other properties. *Bhagwan v. Karam* (1911), 8 A. L. J. 854. See also pp. 370, 371, *ante*.

Contract
when to be
made.

In the absence of a contract to the contrary.—See pp. 376, 377, *ante*. The words do not necessarily refer to a contract at the time of the mortgage. *Rama v. Manak* (1905), 7 Bom. L. R., 191. It is not clear who would be the parties to such contract, where the properties belong to the same owner; in which case the right to claim contribution can only arise upon a severance of the ownership of the mortgaged estates. 'An intention to the contrary' would probably have better expressed the meaning of the legislature. It is hardly needful to state that there can be no contribution where the payment is made by the person primarily liable. See pp. 374, 375, *ante*. It has been held in Madras that an agreement binding only as between the mortgagors would not be a contract to the contrary within the meaning of the section which applies only to contracts between mortgagor and mortgagee. It has also been held that a contract between the owners of the equity of redemption, though binding upon the parties, will not bind their assigns whether with or without notice. *Ramabhadrachar v. Srinivasa* (1900), 24 Mad., 85.

Where the
amount of the
prior mort-
gage exceeds
the value of
the property.

After deducting the amount of the former debt, &c.—When the amount due on the earlier mortgage exceeds the value of the property comprised in that mortgage, the necessary result is that the whole of the amount of the second mortgage is recoverable from the other property comprised in the later mortgage. *Ghulam v. Gobardhan* (1911), 8 A. L. J., 195. A vendor's lien is treated for this purpose like any other incumbrance. *Barnwell v. Ironmonger* (1860), 1 Dr. & S., 242; cf. *DeRochfort v. Dawes* (1871), 12 Eq., 540. A fund with fluctuating income contributes towards the discharge of the mortgage, according to its actual income *de anno in annum*. *Ley v. Ley* (1868), 9 Eq., 174. Improvements made by the purchaser are not taken into account. See p. 374, *ante*.

Contribution between tenant for life and remainder-man.—Questions of contribution may also arise between persons having limited interests and those entitled in remainder. A person having a limited estate is not under any obligation to pay off the principal but only to keep down the interest. He shall, therefore, contribute only in proportion to the benefit he derives from the discharge of the mortgage-debt. In England, it was formerly the rule that the tenant for life should pay one-third and the remainder man two-thirds. But the usual course now is a reference to chamber

to state the amount of contribution. Coote, p. 756. As to the mode of apportionment where the mortgage is payable by instalments of principal and interest, see *O'Rorke v. O'Rorke* (1876), 17 L. R. Ir., 376.

Contribution where mortgaged estates have been devised.

—See p. 378, *ante*. Where lands are devised charged with debts, all the devisees, including the devisee of the mortgaged estate, if so charged must contribute *pro ratâ* towards payment of the mortgage-debt. *Carter v. Barnadiston* (1718), 1 P. Wms., 505; *Middleton v. Middleton* (1852), 15 Beav., 450; *Harper v. Munday* (1856), 7 DeG. M. & G., 369; *disting.* *Wisden v. Wisden* (1854), 2 Sm. & Giff., 396. *I* being entitled to the lands of *P* and *K* mortgaged the same, and by his will having giving his son *H* all his interest in the lands of *P* devised thus, "I give, devise, and bequeath unto my son *A*, but in trust to, and for the sole use and behoof of my daughter *C* without the control of her husband, all my interest in and to my lands of *K*, &c., with full power to dispose thereof with the consent of *C*, but subject to his debts, legacies, &c." After his father's death, *H* took an assignment of the mortgage, and went into possession of all the mortgaged premises. On a bill filed by *C* and her husband against *H*, and *A* praying a redemption and charging that the mortgage was then paid off by the perception of rents and profits: it was held that the lands of *K* were not bound to exonerate the lands of *P*, but that both should contribute rateably to the payment of the mortgage. *Clarke v. Brereton* (1835), 1 Jones, 165.

Where lands devised charged with debts.

Nothing in this section applies, &c.—The last paragraph of this section seems to have been taken from Fisher, sec. 1349, where it is said that the right of contribution will be prevented by the right of marshalling from being applied against an estate which is liable to other creditors of the debtor, citing *Bartholomew v. May* (1737), 1 Atk., 487. Mr. Macpherson thinks that this clause goes too far (*Law of Mortgage*, p. 687), and as it stands, it is certainly not very intelligible.

Actions for contribution.—All the persons liable to contribute should be joined as parties, but the liabilities of the several defendants must be apportioned by the decree. *Hirachand v. Abdal* (1877), 1 All., 455. The plaintiff may also bring a single suit in respect of two or more sales. *Ibn Hosain v. Ramdai* (1889), 12 All., 110; *disting.* *Sesha v. Krishna* (1900), 24 Mad., 96; 10 M. L. J., 383. It should be noticed that the obligation to contribute is not a personal obligation, and the person who is called upon to contribute may exercise his option whether he will save his interest by paying the debt or let his interest go. See *Bhagirath v. Naubat* (1879), 2 All., 115; *Ibn Hosain v. Ramdai*, *supra*; cf. *Baldeo v. Baijnath* (1891), 13 All., 371.

Liability for contribution should be apportioned in decree.

Deposit in Court.

Power to
deposit in
Court money
due on
mortgage

83. At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Right to
money
deposited by
mortgagor.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of complaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

On depositing, &c., the mortgage-deed.—The Court can only compel the mortgagee to deliver up the mortgage-deed. It cannot give any other relief. An order under this section is not in the nature of a decree in a suit; nor can the provisions of sec. 375 (O. 23, r. 3) of the Code of Civil Procedure be extended by analogy to proceedings under this section. *Tatayya v. Pichayya* (1890), 13 Mad., 316.

The mortgagor, &c., may deposit.—Where the mortgagor deposited the amount due in one court after the institution by the mortgagee of a suit to enforce his mortgage in another court, the deposit was held not to be a valid one so as to stop the running of interest. *Bayya v. Narasinga* (1911), 35 Mad., 209. Where a mortgagor before bringing a suit for redemption deposited the mortgage-money in court to the credit of persons who were not entitled to it in addition to that of persons who were really entitled, it was held that he was not entitled to claim the benefit of secs. 83 and 84 inasmuch as the persons really entitled to the money could not draw it out. *Madhavi v. Kunki* (1899), 23 Mad., 510. See also *Debendra v. Sona* (1904), 26 All., 291; *disting. Ram v. Sahibzada* (1889), 5 A. W. N., 328. The deposit must also be unconditional. *Nanu v. Manchu* (1890),

Where deposit
ineffectual.

14 Mad., 49; distinguishing *Kora v. Ramappa* (1893), 17 Mad., 267. If the mortgagee accepts payment, he cannot afterwards enforce his security for any payments made by him which he would have been entitled under the law to add to the mortgage-debt. *Anandi v. Durnajaf* (1890), 13 All., 195. The creditor is entitled to refuse to receive payment in instalments of the sum due to him in the absence of any stipulation or covenant to that effect. *Behari v. Ram* (1902), 24 All., 461; cf. *Raghub v. Bhobui* (1903), 8 C. W. N., 216.

Premature deposit.—When a deposit is premature, the provisions of this section or of sec. 84 do not apply. *Ram v. Krishnaji* (1901), 26 Bom., 312; 3 Bom. L. R., 939. Money deposited by the mortgagor under this section does not become the property of the mortgagee, until he has complied with the conditions laid down in it. *Mothiar v. Ahmadi* (1905), 29 Mad., 232. If a mortgagee draws out of court money which has been deposited by the mortgagor under this section he must be taken to have accepted it in full discharge of the amount due on the mortgage and would be incompetent to carry on an appeal against a decree for redemption with regard to the amount due after such withdrawal. *Dal Singh v. Pitam* (1902), 25 All., 179; Cf. *Ram Chandra v. Keshobati* (1909), 36 I. A., 85; 36 Cal., 840; where a receiver on behalf of the mortgagees withdrew the money deposited. But where the mortgagee refused to accept the amount deposited in full discharge of the mortgage-debt, but upon the mortgagor's statement that the amount deposited might be paid to the mortgagee and that he might seek his remedy for the balance, if any, the mortgagee received the money, it was held that the consequences of deposit in court under this section did not follow and that the withdrawal had not the effect of a full discharge of the debt. *Har v. Pirthi* (1909), 32 All., 142; 7 A. L. J., 65. Where a prior mortgagee has withdrawn a deposit made by a subsequent mortgagee to redeem a prior mortgage, the withdrawal must be deemed to be an acknowledgment by the person to whose credit the money is deposited of an actually existing mortgage capable of being redeemed. *Sunehra v. Shadi* (1904), 1 A. L. J., 590.

Effect of mortgagee withdrawing the deposit.

84. When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to

Cessation of interest.

enable the mortgagee to take such amount out of Court, as the case may be.

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money.

Cessation of interest on improper refusal of tender.—

Where the mortgagor made a proper tender to the mortgagee who refused to hand over to the mortgagor then and there an indorsed reconveyance of the mortgaged property with the title-deeds, the court refused to allow the mortgagee interest and costs subsequent to the date of the tender in the action for redemption brought by the mortgagor. *Rourke v. Robinson* (1911), 1 Ch., 480. But a mortgagor suing for redemption, who had not actually set the money aside, was held liable for interest from the date of tender to the date of actual payment, he having had the use of the mortgagee's money all that time. *Edmondson v. Copland* (1911), 2 Ch., 301. It has, however, been held in a Madras case that interest ceases to run on the principal amount from the date of tender; and that it is not necessary that the mortgagor should after such tender always keep the money ready for payment. *Velayuda v. Hyder* (1909), 33 Mad., 100; 19 M. L. J., 648. But see pp. 232, 236, *ante*. Where, however, the mortgage amount deposited by the mortgagor has been withdrawn by him on the mortgagee's refusal to accept it, interest on such amount does not cease to run. *Krishnasami v. Thippa* (1910), 35 Mad., 44. A tender must be made either to the principal or to his authorised agent and a tender made to a person who disclaims authority to receive it is made at the maker's risk. *Bai Ruttonbai v. The Fraser, &c.* (1907), 32 Bom., 521; 9 Bom. L. R., 203. Interest is not payable for the day on which the money was advanced as also for the day it was repaid in the absence of proof of a usage to that effect. *Raghub v. Bhobui* (1903), 8 C. W. N., 216. A valid tender must be an unconditional offer to pay a specific and ascertained sum, and there cannot be a tender or an agreement to waive tender of an unascertained sum. *Lal Batcha v. Arcot* (1910), 34 Mad., 320. As to when tender of an amount less than what was ultimately found to be due may be a valid tender *pro tanto*, see *Digambar v. Harendra* (1911), 11 C. L. J., 226, 233; 14 C. W. N., 617, 624.

Or as soon as the mortgagor or such other person as aforesaid, &c.—Notice must be served on the mortgagee of the deposit before interest will cease to run. *Sitaramayya v. Venkatramanna*

Whether mortgagor should keep the money tendered always ready

(1888), 11 Mad., 371; cf. *Deo Dutt v. Ram* (1886), 8 All., 502, 508. These cases show that the provisions of the present section will override those contained in the last. Where the mortgagee defendant is a minor it is requisite that a guardian *ad litem* should be appointed both to receive service of the notice of deposit under this section and to take the deposit out of court. Until the mortgagor has procured the appointment of a guardian *ad litem* for the above purpose, he cannot be said to have completely performed his part and cannot therefore claim exoneration from liability to pay interest. *Pandurang v. Mahadaji* (1902), 27 Bom., 23. If the deposit is insufficient, the mortgagor will not be entitled to the benefit of the section, even *pro tanto*. *Deo Dal v. Ram*, *supra*. Where, however, the mortgagor deposited the amount found due by the court of first instance, but on an appeal by the mortgagee the court of appeal found a larger sum to be due, it was held that the sum deposited operated as a payment *pro tanto*, and interest would run after deposit only upon the difference. The principle that a mortgagee is not bound to accept any sum in part satisfaction of his decree applies, it has been said, only to cases where there is no dispute as to what is due. *Digambar v. Harendra* (1910), 11 C. L. J., 226; 14 C. W. N., 617.

Where mortgagee is a minor.

Suits for Foreclosure, Sale or Redemption.

[The provisions relating to procedure contained in sections 85 to 90, 92 to 94, 96, 97 and 99 have been repealed by the Code of Civil Procedure, 1908, and re-enacted in Order XXXIV, of the Code, for which see *post*.]

85. *Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest.*

Parties to suits for foreclosure, sale and redemption.

NOTE.—This section has been repealed by the Code of Civil Procedure (Act V of 1908). For notes see Order XXXIV, rule 1, *post*.

86. *In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any,*

Decree in foreclosure suit.

awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree,

and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims ; and shall, if necessary, put the defendant into possession of the property, but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

NOTE.—This section has been repealed by the Code of Civil Procedure (Act V of 1908). For notes, see Order XXXIV, rule 2, *post*.

Procedure in
case of
payment of
amount due.

87. *If payment is made of such amount and of such subsequent costs as are mentioned in section 94, the defendant shall (if necessary) be put into possession of the mortgaged property.*

Order absolute
for fore-
closure.

If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff :

Power to
enlarge time.

Provided that the Court may, upon good cause shewn and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment.

On the passing of an order under the second paragraph of this section the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, Schedule IV, No. 129, ^{Act XIV of 1892,} for the words "Final decree" the words "Decree absolute" shall be substituted.

NOTE.—This section has been repealed by the Code of Civil Procedure (Act V of 1908). For notes, see Order XXXIV, rule 3, *post*.

88. *In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section 86, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.* Decree for sale.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance or the terms. Power to decree sale in foreclosure suit.

NOTE.—This section has been repealed by the Code of Civil Procedure (Act V of 1908). For notes, see Order XXXIV, rule 4, *post*.

89. *If in any case under section 88 the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in section 94,* Procedure when defendant pays amount due.

Order absolute
for sale.

the defendant shall (if necessary) be put in possession of the mortgaged property ; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section 88 ; and thereupon the defendant's right to redeem and the security shall both be extinguished.

NOTE.—This section has been repealed by the Code of Civil Procedure (Act V of 1908). For notes, see Order XXXIV, rule 5, *post*.

Recovery of
balance due
on mortgage.

90. *When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.*

NOTE.—This section has been repealed by the Code of Civil Procedure (Act V of 1908). For notes, see Order XXXIV, rule 6, *post*.

Redemption.

Who may
sue for re-
demption.

91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property :—

- (a) any person (other than the mortgagee of the interest sought to be redeemed), having any interest in or charge upon the property ;
- (b) any person having any interest in or charge upon the right to redeem the property ;
- (c) any surety for the payment of the mortgage-debt or any part thereof ;
- (d) the guardian of the property of a minor mortgagor on behalf of such minor ;

- (e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot ;
- (f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property ;
- (g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

Besides the mortgagor.—This means a mortgagor who has got a subsisting title to the mortgaged property. Thus a mortgagor cannot redeem if the equity of redemption has been sold in execution, though no certificate of sale may have been granted to the purchaser. *Apa v. Salam* (1889), Bom. P. J., 246. But a mortgagor who has absolutely assigned his equity of redemption will be entitled to redeem, if he is sued by the mortgagee on his covenant. *Kinnaird v. Trollope* (1888), 39 Ch. D., 636 ; cf. *Perry v. Parker* (1803), 8 Ves., 527. As to what amounts to a sale by a mortgagor of his equity of redemption so as to preclude him from redeeming the property, see *Gangadhar v. Balshet* (1887), Bom. P. J., 209. A mortgagor is entitled to redeem notwithstanding the existence of a puisne mortgage. *Baikhantha v. Mohendra* (1901), 1 C. L. J., 65. The words 'or institute a suit for redemption' are wholly unnecessary. See sec. 60, *supra*. As to the meaning of 'mortgaged property' see pp. 257—259, *ante*. As to when policies of insurance effected by the mortgagee may be redeemed by the mortgagor, see *Salt v. The Marquess of Northampton* (1892), A C., 1 ; cf. *Freem v. Brade* (1858), 2 DeG. & J., 582 ; *Bruce v. Garden* (1869), L. R., 5 Ch., 32.

Any person, other than the mortgagee, &c. Clause (a).—Persons interested who can redeem. Any interest in or charge upon the property means any interest in or charge upon the property which is affected by the mortgage, and does not include the interest of a mere ryot in Bengal. *Girish v. Juramoni* (1898), 5 C. W. N., 83 ; see also p. 238, *ante*. Disting. *Appu v. Amina* (1895), 19 Mad., 151. A prior mortgagee who has by purchase or foreclosure obtained the interest of the mortgagor is entitled to redeem a subsequent mortgagee. *Mangli v. Pati* (1904), 1 A. L. J., 360 ; *Hassanbhai v. Umaji* (1903), 28 Bom., 153. In *Bhajahari v. Gajendra* (1909), 37 Cal., 282 ; 14 C. W. N., 672, the transferees of a

When prior mortgagees allowed to redeem.

prior mortgagee who claimed also to be assignees of the equity of redemption and had been made defendants in a suit by the subsequent mortgagee for sale on his mortgage, were held entitled to redeem the second mortgage. The court, however, went further and held that even if the transferees were only in the position of prior mortgagees they having been made parties to the second mortgagee's suit, were entitled to pay off the second mortgage and save the property from sale, as otherwise there was no use or necessity for making them parties. A lessee under a lease granted by a mortgagor subsequent to the mortgage of a portion of the mortgaged property is entitled to redeem the mortgage. *Raghunandan v. Ambika* (1907), 29 All., 679. A sub-mortgagee of a puisne mortgagee is also entitled to redeem a prior mortgage. *Ram Subhag v. Narsingh* (1905), 27 All., 472. A puisne mortgagee's right to redeem a prior mortgage, however, exists only so long as the prior mortgage on that portion of the security common to the two mortgages is a subsisting one and is capable of being redeemed. *Baikantha v. Mohendra* (1901), 1 C. L. J., 65. The reversionary heirs of the deceased husband of a Hindu widow have no such interest in the mortgaged property during the life-time of the widow as would entitle them to redeem a mortgage made by the husband. *Ram v. Kallu* (1908), 30 All., 497; 5 A. L. J., 631. Where on the death of a tenant without leaving any heirs, the mortgaged holding reverts to the zemindar and is not escheated to the crown, the zamindar is entitled to redeem the mortgage. *Tulshi v. Gurdial* (1910), 33 All., 111, overruling *Ram v. Maharajah of Vizianagram* (1908), 30 All., 488. Where the equity of redemption is limited to persons other than the owners, it may be laid down as a general rule that the right to redeem will nevertheless subsist in the owners, unless a clear intention is shewn to change the ownership of the property for purposes other than those of the particular mortgage. See p. 239, *ante*; cf. *Immudipattam v. Periya* (1900), 28 I. A., 46; 24 Mad., 377.

Reversioner of Hindu widow not allowed.

Persons having interest in the right to redeem.

Any person having any interest in, &c. Clause (b).—See pp. 237—240, *ante*; cf. *Sakharam v. Gangaram* (1895), Bom. P. J., 214. Trustees on trust to sell and pay off debts which have been satisfied cannot be said to have any interest in the property which would entitle them to redeem. *James v. Biou* (1826), 2 Sim. & St., 600. For the right to redeem where an administrator reserves the equity of redemption to himself and his executors, &c., see *Skeffington v. Whitehurst* (1837), 3 Y. & C., 1; (1842) 9 Cl. & F., 219. Where a trespasser who has acquired a possessory title makes a mortgage, the rightful owner if he happens to be the mortgagor's heir, may redeem in that charac-

ter. *Swamirao v. Padappa* (1892), 18 Bom., 22, reversed but only on the ground that a mortgage of *vattan* property could not bind the heir of the *vatandar*. *Padapa v. Swamirao* (1900), 24 Bom., 556. It may also be noticed that a person who has acquired a possessory title under the Statute of Limitations against the mortgagor may claim to redeem. *Fletcher v. Bird* (1896), reported in Fisher, p. 1025.

Any surety for the payment of the mortgage-debt or any part thereof. **Clause (c).**—A surety for the payment of the interest alone under a mortgage may redeem. *Green v. Wynn* (1869), L. R., 4 Ch., 204; *Forbes v. Jackson* (1882), 19 Ch. D., 615. But a surety cannot redeem a mortgage given by the debtor to the creditor at a different time for another part of the same debt. *Wade v. Coope* (1827), 2 Sim., 155; Contract Act, secs. 140, 141; and see pp. 342, 345, *ante*. The rights of the surety are briefly summed up in Fisher, sec. 1427. "A surety is entitled to redeem the estate charged by virtue of his right to avail himself of all the creditors' securities; but not where the suretyship is for another debt, or for a distinct part of the same debt, for which the first security is given. Therefore, if a surety by bond for part of a debt, the other part whereof is secured in another transaction by a mortgage, be compelled to pay on his bond, he is not entitled against a subsequent mortgagee of the same estate to the benefit of redemption of the mortgage, in satisfaction of what he has paid on the bond."

Surety's right to redeem.

Clauses (d) and (e).—These clauses are wholly superfluous and seem to have found their way into the section from English text-books where the right both of the committee of a lunatic and the guardian of an infant to redeem a mortgage on the lunatic or infant's estate is treated as a debatable point merely because the nature of the estate may be thereby changed as between the real and personal representatives. See Coote, 717; Fisher, secs. 1440, 1441. These clauses would also seem by implication to negative the right of the guardian of a minor or the committee of a lunatic to redeem, if such minor or lunatic is not the mortgagor (see definition in sec. 58, *supra*), but is merely interested in redeeming the mortgaged property. But this could scarcely have been the intention of the legislature.

Guardian of minor and committee of lunatic.

The judgment-creditor of the mortgagor, &c. Clause (f).—**Judgment-creditor.** See p. 586, *ante*. See also *Ghulam v. Dinanath* (1901), 23 All., 467.

A creditor of the mortgagor who has in a suit, &c. Clause (g).—**Creditor.** See p. 586, *ante*. Where pending a suit by creditors for a sale of the estate, the mortgagee fraudulently obtained a decree for foreclosure; it was held that they should redeem him notwithstanding the decree. *Soley v. Salisbury* (1725), 9 Mad., 153; 2 Eq., Ca. Abr., 600.

Enumeration
of persons not
complete.

Many of the clauses in this section seem to be altogether superfluous, if not misleading, as with the exception of clause (c) all the other clauses may be reduced to the simple proposition that any person who is entitled to any interest in any part of the land may redeem. See p. 237, *ante*. The enumeration too, though it has the appearance of being complete, is in reality not so. For instance, there is no mention of the Court of Wards or the assignee of an insolvent or a trustee under a deed of arrangement for the benefit of creditors; nor is anything said of the right of the Crown to redeem an estate which has been vested in it by escheat or forfeiture. See *Rogers v. Maule* (1841), 1 Y. & C. C. C., 4; *Att.-Gen. v. Crofts* (1708), 4 Bro. P. C., 136.

Order in which persons are admitted to redeem.—See pp. 239, 240, *ante*. See also *In re Cassan's Estate* (1865), 15 Ir. Ch., 313, where it was held that as between the tenant for life and his mortgagee, the prior and better right to redeem incumbrances on the fee belongs to the mortgagee.

Decree in
redemption-
suit.

92. *In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree ordering—*

that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree;

that, upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall re-transfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property;
and

that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mort-

gage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.

NOTE.—This section has been repealed by the Code of Civil Procedure (Act V of 1908). For notes, see Order XXXIV, rule 7, *post*.

93. *If payment is made of such amount and of such subsequent costs as are mentioned in section 94, the plaintiff shall, if necessary, be put into possession of the mortgaged property.* In case of redemption, possession.

If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold. In default, foreclosure or sale.

If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.

If he applies for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished :

Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to Power to enlarge time.

time postpone the day fixed under section 92 for payment to the defendant.

NOTE.—This section has been repealed by the Code of Civil Procedure (Act V of 1908). For notes, see Order XXXIV, rule 8, *post*.

Costs of mortgagee subsequent to decree.

94. *In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.*

NOTE.—This section has been repealed by the Code of Civil Procedure (Act V of 1908). For notes, see Order XXXIV, rule 10, *post*.

Charge of one of several co-mortgagors who redeems.

95. Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

See pp. 347, 348, 370, *ante*.

Where one of several mortgagors, &c.—See the definition of mortgagor in sec. 58, which must considerably restrict the operation of this section if it is construed literally.

Charge follows upon redemption where possession not possible.

And obtains possession thereof.—These words would seem to confine the operation of the section within still narrower limits. It has, however, been held by the Privy Council that it is more reasonable to construe the section distributively, to make the condition of obtaining possession apply only to the cases where possession is possible from the nature of the mortgage, and in other cases to make the charge follow upon redemption. *Ahmad v. Shamsul* (1905), 33 I. A., 81; 28 All., 482. See p. 347, *ante*. It is surmised that the mortgagor who redeems would make himself liable to account as mortgagee in possession, though neither the provisions of sec. 72 nor those of sec. 76 are in terms applicable to such cases. See *Deonarain v. Naek Pershad* (1870), 2 N.-W. P., 217. One of several co-mortgagors, though entitled to redeem the whole of the mortgaged property, cannot, however, disturb the possession of his fellow mortgagors by

bringing an action for redemption. *Anandrao v. Taty* (1888), Bom. P. J., 37.

He has a charge on the share, &c.—It would seem, at first sight, that a co-sharer who redeems whatever may be the nature of the security can only claim a charge; in which case it would not be enforceable against a *bonâ fide* purchaser for value. But this could hardly have been intended by the legislature. Difficult questions may also arise on the Statute of Limitations, if the co-mortgagor who redeems is not treated as an assignee of the original security. See p. 348, *ante*; see also Limitation, *post*. It is surmised that the draftsman found the word 'charge' in the old Sadar Dewani judgment to which the Law Commissioners refer, where it was probably used as meaning the same thing as a mortgage. This also seems to be a probable explanation of the use of the word 'expenses' which ordinarily would not include the mortgage-debt itself. For cases dealing with the position of a person redeeming a mortgage, though he has only a partial interest in the equity of redemption, see in addition to the authorities in note 2, p. 348, *ante*, *Norender v. Dwarka* (1877), 3 Cal., 408; *Nainappa v. Chidambaram* (1897), 21 Mad., 26; *Asaraj v. Wazir* (1894), 11 A. W. N., 211; *Raghubar v. Bunyad* (1889), 6 A. W. N., 152; *Rani v. Amir* (1900), 18 A. W. N., 39; *Digambar v. Harendra* (1911), 14 C. W. N., 617; cf. *Shankar v. Anagi* (1886), Bom. P. J., 165; where a prior mortgage had been redeemed by the mortgagee of one of several co-parceners, and he was held entitled to claim contribution from the mortgagees of another co-parcener before giving up the latter's share. See also *Ganesh v. Rughunath* (1880), Bom. P. J., 300; *Pandirav v. Naroji* (1881), Bom. P. J., 57. It was held in the last two cases that where one or more of several tenants in common redeem the whole mortgage, their right to receive the rents and profits until the amount due by the co-mortgagors as their contribution towards the redemption-money has been paid off, cannot be disturbed by the mortgagee for the purpose of realising any subsequent mortgage executed by the other co-parceners of their shares.

Redemption by limited owner.—Where the tenant for life of property held by a mortgagee in possession filed a bill to redeem all the charges on the property, including a legacy charged upon it by the will of the ancestor of her testator; for an account of what was due to herself in respect of the excess of the rents received by the mortgagee beyond interest on the mortgage-debt; for a charge upon the property in respect of what was so due; and for consequential relief; it was held (1) that she had a right to a charge upon the property for the excess; and (2) that she had a right in case she redeemed, to all the costs of the suit as against the parties taking in remainder

Right of co-mortgagor to claim a charge.

Redemption by limited owner.

under her testator's will. *Collyer v. Collyer* (1863), 3 DeG. J. & S., 676.

Sale of Property subject to prior Mortgage.

Sale of property subject to prior mortgage.

96. *If any property the sale of which is directed under this chapter is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.*

NOTE.—This section has been repealed by the Code of Civil Procedure (Act V of 1908). For notes, see Order XXXIV, rule 12, *post*.

Application of proceeds.

97. *Such proceeds shall be brought into Court and applied as follows:—*

- first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;*
- secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage ;*
- thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;*
- fourthly, in payment of the principal money due on account of that mortgage ; and*
- lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or, if there be more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.*

Nothing in this section or in section 96 shall be deemed to affect the powers conferred by section 57.

NOTE.—This section has been repealed by the Code of Civil Procedure (Act V of 1908). For notes, see Order XXXIV, rule 13, *post*.

Anomalous Mortgages.

98. In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Mortgage not described in section 58, clauses (b), (c), (d) and (e).

Anomalous Mortgages.—Such mortgages are not very common, either in Bengal or in the North-West; though Madras seems to be rich in them, where the reports bristle with cases arising out of a variety of local mortgages. See pp. 101, 102, *ante*. It has been already pointed out that the ottidar in Madras is entitled to a right of pre-emption; and it remains to add that this right cannot be defeated merely because he has the option of bidding at an execution-sale; as the ottidar should not be driven to give a fancy price at an auction, his position entitling him to be fully informed of the price he has to pay before he can be called upon to buy. *Ramapurath v. Ramapurath* (1882), 5 Mad., 198; but see *Vasudevan v. Keshavan* (1884), 7 Mad., 309. The last-mentioned case, however, may be distinguished upon the ground that an offer was made to the ottidar's karnavan to purchase at the price offered by the highest bidder, as well as on the ground that the claim was confined merely to setting aside the auction-sale. See also *Paluvindeagath v. Pudiamadathumel* (1892), 2 M. L. J., 231; explaining *Ramapurath v. Ramapurath*, *supra*. An ottidar has also the right to make further advances which has naturally grown out of his right of pre-emption. A kanomdar however occupies a different position. The reason for the distinction as explained in *Marakar v. Munhoruli* (1882), 6 Mad., 140, overruling *Paidal v. Parakal* (1862), 1 Mad. H. C., Rep., 13, is perfectly intelligible. The ottidar practically advances to the full value of the property, and his position differs but very little from that of an absolute purchaser. Having invested so much in the property, it is but natural that he should secure his holding from disturbance by an understanding with the jenmi that he should have not only the right of pre-emption, but also the option of making further advances. The right of the ottidar to make further advances will thus preclude a person claiming under a deed of further charge from enforcing his security, if no option was given to the ottidar to make the further advance. *Ambu v. Raman* (1886), 9 Mad., 371.

Anomalous mortgages.

Right of an ottidar.

Position of kanomdar different.

This right of the ottidar continues as well before as after the lapse of the customary period. *Ali v. Nilla Kanden* (1863), 1 Mad. H. C., 356; cf. *Keeran Avulla v. Narikote* (1891), 1 M. L. J., 485, a case of *mattotti*.

Rights of
ottidars and
kanomdars.

It should be added that although the right to hold for twelve years is one of the customary incidents of ottis as well kanoms, such right may be excluded by agreement between the parties. *Shekhara v. Raru* (1879), 2 Mad., 193; *Ahmed v. Kunhamed* (1887), 10 Mad., 192; disting. *Kanara v. Gorindan* (1882), 5 Mad., 310; *Muhamud v. Ali Koya* (1890), 14 Mad., 76. Then, again, not only may the right of the kanomdar or ottidar to hold for twelve years certain be curtailed by an agreement to that effect, but his right to hold the land as a security at all will depend on his acting conformably to usage and the jenmi's interest. If, therefore, the mortgagee repudiates the jenmi's title, he will forfeit his right to hold for the customary period. *Ramen v. Kandapuni* (1863), 1 Mad. H. C., 445; *Mayavanjari v. Nimini* (1864), 2 Mad. H. C., 109; *Kellu v. Puapalli* (1864), 2 Mad. H. C., 161. And it seems to make no difference that the title is repudiated for the first time in the pleadings. *Mayavanjari v. Nimini* (1864), *supra*; but see *Paidal v. Parakal* (1862), 1 Mad. H. C., 13. See also *Raman v. Vasudevan* (1903), 27 Mad., 26, where by the terms of a kanom deed the term for its redemption having been fixed for 59 years, it was held that though the kanomdar prior to the expiration of the term had disclaimed the title of the jenmi, the transaction not being a lease but an anomalous mortgage, the disclaimer of the jenmi's title did not entail a forfeiture so as to enable the jenmi to redeem the mortgage before the expiration of the term. A kanom is an anomalous mortgage and it can be redeemed on the expiry of the customary term of twelve years without notice. A renewal of a kanom can be effected only by a registered instrument under section 59. *Gopalan v. Kunhan* (1907), 30 Mad., 300. A suit for redeeming a kanom within 12 years from the date of the kanom is maintainable even where the kanom contains a provision that the jenmi should recover only "Avasyami Chodikumbole" or "Avasyami Vendumbole." *Kelu v. Krishnan* (1903), 13 M. L. J., 374. See also *Gopalan v. Kunhan* (1907), 30 Mad., 300; 17 M. L. J., 189. But the right of an ottidar is not forfeited simply by his setting up further charges which he fails to prove or by his denying the validity of an assignment of the jenmi's title in favour of a third party. *Kannoth v. Vannathan* (1880), 3 Mad., 74. According to the custom prevailing in Malabar, wilful and extensive waste, committed by a kanomdar is a sufficient ground for the forfeiture of the kanom; though the kanomdar does not lose his right to recover the kanom amount or any renewal fees that he might have paid to the owner of the land. *Mal-*

Whether the
mortgagee for-
feits his right
by disclaimer
of jenmi's
title.

Where wilful
waste by kan-
omdar.

larkandi v. Narayana (1899), 9 M. L. J., 306; cf. *Ramen v. Kanda-puni* (1863), 1 Mad. H. C., 445; *Mayavanjari v. Nimini* (1864), 2 Mad. H. C., 109. When the mortgagor is unable to give possession, the amount advanced by the kanomdar may be immediately recovered from him. *Vayalil v. Udaya* (1865), 2 Mad. H. C., 315. But a promise to pay is not one of the incidents of a kanom. *Sridari v. Virarayan* (1899), 22 Mad., 350; *Viyathen v. Veerayan* (1899), 9 M. L. J., 108. But the mortgagee does not forfeit his right to hold for twelve years by merely allowing the rent to fall into arrears. *Rautan v. Kadangot* (1862), 1 Mad. H. C., 112; *Kunju v. Manavikrama* (1863), 1 Mad. H. C., 113, note; *Krishna v. Shankara* (1862), 1 Mad. H. C., 113, note. If the rent remains unpaid, the jenmi may either sue for it or take credit for the amount in arrears when he pays off the mortgage. *Unian v. Rama* (1885), 8 Mad., 415, and the cases cited therein. The right to claim such credit being one of the incidents of the transaction, a pledge of his rights to a third party by the kanom holder cannot affect the right of the jenmi to set off the arrears due to him, against the sum due to the kanom holder from the jenmi. *Achuta v. Kali* (1884), 7 Mad., 545. A jenmi, who has obtained a decree for arrears of rent, may sell the kanom before the expiry of twelve years. Such a sale, however, does not put an end to the kanom but only transfers the kanomdar's interest to the purchaser at the execution-sale. *Achutan v. Kesharan* (1893), 17 Mad., 271.

Incidents of
otti and ka-
nom.

An 'Ubhayapattom' is a kanom mortgage, and where from the terms of such a document it is clear that the debt was not intended to be extinguished, a covenant for perpetual renewal by the mortgagor operates as a clog on the equity of redemption and will be inoperative. *Neelukandahn v. Ananthakrishna* (1906), 30 Mad., 61; 16 M. L. J., 462. See also *Kelu v. Krishnan* (1903), 13 M. L. J., 374; *Gopalan v. Kunhan* (1907), 30 Mad., 300; 17 M. L. J., 189.

Covenants for
perpetual re-
newal inopera-
tive.

Another noticeable peculiarity of these mortgages is that on redemption the jenmi pays not only the amount advanced to him, but also the value of improvements made by the mortgagee. *Kanna v. Kombe* (1885), 8 Mad., 381. But this will not interfere with the right of a kanomdar to remove and appropriate to himself during the period of his occupation any trees that he has planted, provided that he leaves the property substantially in the state in which he received it. *Vasudevan v. Valia* (1900), 24 Mad., 47; 10 M. L. J., 321. In some districts, however, as Ernad, the jenmi on redemption is entitled to take credit for one-half of the value of improvements effected by the kanomdar. *Unnian v. Rama* (1885), 8 Mad., 415; but see *Achutan v. Narasimham* (1897), 21 Mad., 411. Under the head of improvements, however, the kanomdar is not entitled to claim the value of

Other inci-
dents of ka-
nom and otti.

Improvements by kanomdar. trees of spontaneous growth. *Narayana v. Narayana* (1884), 8 Mad., 284. In connection with this question, it may be mentioned that it has been judicially decided that there is no usage in Malabar, nor any presumption, that a tenant is not entitled to compensation for improvements effected prior to the date on which the kanom was renewed, if his right to it was not specially reserved by the deed. *Mupana v. Virupa* (1881), 4 Mad., 287.

Other anomalous mortgages.

Very closely allied to the kanom and otti are the mortgages known from ancient times in Malabar as ottikamparam and nirmutal. The distinction between these different forms of mortgage is thus stated in *Kundu v. Impichi* (1883), 7 Mad., 442. "The distinction between kanom and otti consists in this, that in the latter the mortgagor is ordinarily taken to have received two-thirds of the value of his land, and the interest due on the debt is considered to be equal to the annual rent. Ottikamparam is a higher stage of the mortgage. The mortgagor is taken to have borrowed 10 per cent., or more of the amount of the otti. Under this tenure, the mortgagor must also repay the further advance with interest at 10 per cent., when he pays off the otti. The next stage of the mortgage is nirmutal. This transaction is entered into when a still further sum is lent after the execution of ottikamparam. By this transaction the mortgagor gives up all but the right of water." There is another form of mortgage known as kividu otti, the precise character as well as the incidents of which are somewhat obscure. The better opinion, however, seems to be that kividu otti is not an absolute transfer, but a transaction in the nature of a mortgage and therefore liable to be redeemed. The interest, however, or to use the language of Scotch law, the radical right left in the jenmi after he has parted with the land under a kividu otti is of the most shadowy character. In addition to the above kinds of mortgage, there is a form of mortgage called peruartham in certain parts of Malabar, in which the mortgagor takes the full value of the property and can redeem only on payment of the market value of the land at the time of redemption, whatever may have been the amount for which the security was originally given. *Shekari v. Mangalom* (1876), 1 Mad., 57.

Kividu otti.

Pernartham.

The different forms of mortgage in Malabar illustrate in a striking manner the infinite divisibility of ownership. They also point an important moral; for they show the tenacity with which the people of this country cling to their lands and their reluctance to part even with the mere appearance of ownership in their fields and houses.

Attachment of Mortgaged Property.

Attachment of mortgaged property.

99. *Where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the*

mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43.

NOTE.—This section has been repealed by the Code of Civil Procedure (Act V of 1908). For notes see Order XXXIV, rule 14, *post*.

Charges.

100. Where immovable property of one person ^{Charge.} is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 [*and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property*]¹ shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.

Where immovable property, &c., is made security for the payment of money.—It will be observed that the words ‘an engagement which may give rise to a pecuniary liability’ which occur in sec. 58 have not been reproduced in this section. For the validity of a charge on all existing property; see pp. 169, 172, 173, *ante*. See also *In re Kelcey* (1899), 2 Ch., 530; cf. *Bhagwan v. Narain* (1890), 7 A. W. N., 192.

For the distinction between a charge and a mortgage; see ^{Distinction between charge and mortgage.} pp. 103, 104, *ante*. The distinction may be illustrated by the familiar case of a charge of debts or legacies on immovable property, very common in English wills; the effect of which is that a portion of the property is made a security for the payment of such debts and legacies.

¹ These words have been repealed by the Civil Procedure Code, Act V of 1908.

Distinction between charge and mortgage. In such case neither the creditors nor legatees can properly be called mortgagees, nor can it be said that any money is due to them on mortgage; though nobody can take the property without paying them the charge. For the most recent English case on the subject, see *Bank of Ireland v. McCarthy* (1898), A. C., 181. The case is the same with a rent charge, whether it is a gross charge payable at a fixed period or a perpetual charge payable annually. *Earl Poulett v. Hood* (1866), 35 Beav., 239, 240. For the distinction between a charge and a trust, see *Anund v. Grish* (1881), 7 Cal., 772, and the cases cited therein. In the phraseology of the English law, a charge only gives a right to payment out of a particular fund or particular property, without transferring that fund or property. *Tancred v. Delagoa, &c., Co.* (1889), 23 Q. B. D., 239. But in this country the line of division is not so well marked. See p. 103, *ante*. Cf. *Kishan v. Ganga* (1890), 13 All., 28. An instrument by which payment of money is secured on land must be taken to create a mere charge, unless there is an indication in it that some interest in specific immovable property was transferred; *Royzuddi v. Kali Nath* (1906), 33 Cal., 985; 4 C. L. J., 219. Cf. *Gobinda v. Dwarka* (1908), 35 Cal., 837; 7 C. L. J., 492; 12 C.W. N., 849.

Where mortgage not executed in proper form.

On the question whether a mortgage not executed with the formalities required by the law can be enforced as a charge, see cases in note 3, p. 148 *ante*, and notes under sec. 59 *ante*.

Charge to be realised by sale.

It may be here remarked that it is of the very essence of a charge that it should be realised by sale. A mere power in a company to prevent a transfer of shares till all moneys due to them from the shareholder are paid will not, therefore, create a charge on the shares. *In re Dunlop* (1882), 21 Ch. D., 592, 593. It may also be noticed that a charge in England may be binding in equity on property of which a legal mortgage is forbidden. *Metcalf v. The Archbishop of York* (1836), 1 My. & Cr., 547; *Tailby v. Official Receiver* (1888), 13 App. Cas., 523, 549. But no such distinction is recognised in our law. Where however, some members of a joint family without the consent of the rest created a mortgage which was void under the Mitakshara, it was held that though the mortgage was bad, the debt secured by it was a charge on the property which was binding upon persons who derived their title subsequently from the mortgagors. *Jamuna v. Ganga* (1892), 19 Cal., 401. Again, where a judgment-debtor raised a part of the judgment-debt on a mortgage of certain attached properties and paid the amount to the creditor, it was held that though the mortgage was void under sec. 305 (now O. 21, r. 83) of the Code of Civil Procedure, the creditor was entitled to a charge upon the properties as against the execution-creditor. *Mauna v. Venkatasami*

(1890), 1 M. L. J., 220. And where owing to a previous erroneous judgment, effect could not be given to a deed as creating a mortgage, the creditor was held entitled to a charge upon the property. *Bhagobut v. Radha* (1891), 15 All., 304.

Where by a document the "properties" of one of the parties are made liable, but it appears on the construction of the document that only certain specific properties were meant, a charge will be created on such specific properties alone. *Manickam v. Audinarayana* (1910), 34 Mad., 47. Charge allowed in certain cases.

Where certain bonds were described as being "tacked on to a mortgage-deed" and contained a full specification of the mortgaged property it was held that a charge within the meaning of this section was created. *Bhikham v. Shankar* (1909), 6 A. L. J., 255. But a direction in a will that the guardian of certain legatees shall pay a certain monthly sum for maintenance to a certain person does not create a charge on any particular property. *Bhagwati v. Danna* (1904), 1 A. L. J., 327.

Covenant to charge.—A mere covenant to charge lands hereafter to be acquired will not create a charge except where the covenant refers to particular property or where property has been acquired with an intention to perform or satisfy the covenant. See pp. 169—172, *ante*. See also *Mornington v. Keane* (1858), 2 DeG. & J., 292; *Roundell v. Breary* (1858), *ib.*, 319; *Cleary v. Fitzgerald* (1842), 5 L. R. Ir., 351. Cf. *In re Humble* (1860), 11 Ir. Ch., 132. A covenant to charge which contemplates the doing of some further act will also not of itself create a charge, for instance a covenant to charge on request. *Ex parte Izard* (1874), 9 Ch., 271, 275. But a contract for value to give a charge on ascertained or ascertainable property in a certain event will bind the property in the hands of the owner when that event happens. *In re Hurley's Estate* (1894), 1 Ir. R., 488; *Madho v. Sidhbinaik* (1887), 14 Cal., 687; if correctly reported is not law. See p. 149, *ante*. Effect of covenant to charge.

An agreement by an unregistered document to execute a deed of mortgage over certain properties when called upon to do so accompanied by a deposit of title-deeds with regard to those properties made outside the towns specified in section 59, does not create a charge in favour of the creditor. *Konchadi v. Shiva* (1904), 28 Mad., 54.

Charges created by act of parties.—No formal words are necessary for the creation of a charge. A father, upon the marriage of his daughter, executed a deed whereby he covenanted to pay his daughter an annuity, and, for the purpose of securing the annuity, appointed a receiver of the rents and profits of lands in which he had an estate for life, with a direction to apply the moneys received as speci- How charges are created.

How charges
are created.

fied in the deed. The deed contained provisions that the appointment should not be revoked by the appointer, and for the appointment of subsequent receivers, if necessary. It was held, that the deed created a charge upon the father's life estate in the lands. *Cradock v. Scottish Provident Institution* (1892), 63 L. J. Ch., 15; 70 L. T., 718. Again, where a borrower made a lease of certain lands and assigned the reserved rent to the creditor but did not convey to him any further interest in the land, the value of the lease was ordered to be paid to the creditor on the bankruptcy of the debtor as in the case of a mortgage. *Ex parte Wills* (1790), 2 Cox, 233. Persons assigning property, on which they have a charge or incumbrance, upon the faith of an agreement not carried into effect, that they shall have a charge on another estate, will also be considered as equitable incumbrancers on the latter. See *Bank v. Whittall* (1847), 1 D. & S., 536; *Beckett v. Cordley* (1778), 1 Bro. c.c., 353; *Parish v. Poole* (1883), 53 L. T. N. S., 35. And even a recital in a bond that the obligor has become possessed of an estate under a certain will upon the execution of which he had promised the testator to provide for the obligee will create a charge on the estate. *Atkins, Exp.* (1837), 2 Y. & C., 536. A memorandum or an agreement showing an intention to deposit title-deeds by way of equitable mortgage, or to charge the property comprised in those deeds with the payment of the debt, has also been held sufficient in England to create an equitable charge without actual deposit. *Sheffield Union Banking Co., Ex parte* (1854), 13 L. T., 477; *Jones, Ex parte* (1835), 4 Deac. & C., 750; *Heathcote, Ex parte* (1842), 2 Mont. D. & D., 711. Cf. *Nakeram v. The New, &c., Corporation, Ltd.* (1896), 1 C. W. N., xxxviii. And where a bankrupt, being indebted to the petitioner, as the acceptor of two bills of exchange, entered into an agreement with them and *W. L.* that the bills should be paid out of the proceeds of certain property, the deeds of which were then in the hands of *W. L.* for sale; it was held, that the petitioners might claim as equitable mortgagees, but subject to any prior lien of *W. L.*; *Greenhill, Ex parte* (1833), 3 Deac. & C., 334. For cases in which a power of attorney has been held to constitute an equitable mortgage, see *Bennett v. Cooper* (1845), 9 Beav., 252; *Parkinson, In re* (1861), 13 L. T., 26; *Abbott v. Stratton* (1846), 9 Ir. Eq. R., 233. A charge need not unlike a mortgage be executed in writing, but if the parties choose to reduce the transaction to writing, they must comply with the provisions of the Registration Act. See pp. 103, 104, *ante*; cf. *Bengal Banking Corporation v. Mackertich* (1884), 10 Cal., 315; *disting. Appasami v. Manikam* (1885), 9 Mad., 107, 108. See also p. 149, *ante*. In England, on the other hand, though a charge must be created by a

Writing not
essential.

written instrument, however informal, which shows with sufficient certainty the intention to create a security, registration is not essential. The Indian law is therefore in one respect less and in another respect more stringent than the English law. The result is that a mere agreement to create a charge contained in an unregistered writing cannot create an immediate charge on the land, though it would do so in England on the principle that equity regards that as done which ought to be done. And this distinction must not be overlooked in applying English authorities. It should be also noted that in England where a valid contract is entered into to create a security, but the requisite formalities are not observed, equity will nevertheless enforce it as a charge; except where a security is declared by statute to be void both at law and equity if it is not accompanied by certain formalities, though the want of compliance may be due to the fraud of the mortgagor. See pp. 148, 742, *ante*; cf. *Thompson v. Leake* (1815), 1 Madd. 39; *Hughes v. Morris* (1852), 2 DeG. M. & G., 349; *McCalmont v. Rankin* (1852), 2 DeG. M. & G., 403; *Liverpool Borough Bank v. Turner* (1860), 1 J. & H., 159; 2 DeG. F. & J., 502. It should be added that the question whether there is a charge or not must be decided under the terms of this section and that English cases are useful only as illustrations. Deeds are to be liberally construed, *Janardan v. Anant* (1908), 32 Bom., 386.

Difference between English and Indian law.

Charges created by operation of Law.—There is no distinction in their effect between a charge created by act of parties and one created by operation of law; though in the English law the word lien is generally used to denote a security which does not arise out of a contract. As to charge for maintenance and similar charges under Hindu Law, see p. 137, *ante*, and the notes to sec. 39; cf. *Becha v. Mothana* (1900), 23 All., 86.

Charges created by operation of law.

Charges under Hindu Law.

Lien of cestui que trust.—See p. 132, *ante*. See also Ashburner, pp. 115—118. It follows from the rule that a *cestui que trust* can claim a charge on property purchased with trust-money, that where trust-money has been invested on an insufficient security, and the trustees are ordered to replace the fund the *cestui que trust* is entitled to a lien on the security until the fund is replaced. *In re Whiteley* (1886), 33 Ch. D., 347; 12 App. Cas., 727. In 1875 L advanced 800l. to C, his solicitor, to be invested by the latter. On the 12th February 1876, L asked C for some evidence of the investment, and C wrote and gave him a memorandum stating that the 800l. was in C's hand at interest at 5l. per cent. "being part of a large sum advanced to P on security of free-hold houses at K." C afterwards died insolvent, and it then appeared that there was no mortgage by P, but that in 1873 P and Y had entered into a partnership arrange-

Illustrations of such charges. Lien of cestui que trust.

ment for the purchase of houses at *K*; *C* by himself or his clients providing the purchase-money, *P* executing the mortgages necessary to raise the money and paying back half the money provided by *C* personally by the 1st November 1876, and paying interest at 5l. per cent. in the meantime; and either party having the right to demand a sale after that date. A sum of nearly 7,000l. was due to *C* on the 1st January 1876. It was held that *L* was entitled to a charge on *C*'s share of the proceeds of the sale of the houses to the extent of the 800l. and interest. *Crowdy, In re* (1880), 46 L. T., 71. Cf. *Ex parte Rogers* (1856), 8 DeG. M. & G., 271.

Lien of trustee.—Pp. 121, 413, *ante*; and see the notes at the end of this section.

Lien of trustee,
receiver, or
manager

Lien of receiver or manager.—See p. 120, *ante*; see also *Bertrand v. Davies* (1862), 31 Beav., 429; *Fraser v. Burgess* (1860), 13 Moo. P. C., 314, 346; *Batten v. Wedgwood, &c., Co.* (1884), 28 Ch. D., 317, 324; *Prem Lall v. Shambhoo* (1895), 22 Cal., 960; cf. *Moran v. Mittu* (1876), 2 Cal., 58.

Lien on land
by outlay
thereon.

Lien on land by outlay thereon.—See pp. 121, 122—124, *ante*; see also Form 3, Seton, p. 2054; cf. *Davey v. Durrant* (1857), 1 D. & J., 535; *William v. Thomas* (1862), 2 Dr. & Sm., 29; *Plimmer v. Mayor of Wellington* (1884), 9 App. Cas., 699, 714; and see the remarks of Lindley, L. J., in *Stout v. Tapett* (1890), W. N., 23. A person redeeming a mortgage with the knowledge and consent of the mortgagor and who had obtained possession of the mortgaged property was held entitled to a lien on the property. *Sambu v. Nama* (1911), 13 Bom. L. R., 867.

Solicitor's
lien.
Illustrations of
such charges.

Lien of solicitor.—See pp. 121, 133, *ante*. For instances of solicitor's lien, see *In re Jones and Roberts* (1905), 2 Ch., 219; *In re Wright's Trust* (1901), 1 Ch., 317. As to the summary jurisdiction exercised by the Bombay High Court for the purpose of enforcing a solicitor's lien for costs, see *Cullianjee v. Raghawajee* (1904), 6 Bom. L. R., 879. As to the right to be exercised by a solicitor claiming a lien, see *Aishabibi v. Ahmed* (1910), 35 Bom., 325. A solicitor assenting to a compromise on behalf of infants does not thereby lose his right to the ordinary lien he would have had for his costs, if the parties to the compromise had been *sui juris*. *In re Wright's Trusts* (1901), 1 Ch., 317; (1900), W. N., 261.

Vendor's and
similar liens.

Vendor's lien and similar liens.—See pp. 127-131, *ante*. It has been held in England that payment of rent by the assignor of a lease does not create in his favour a lien on the term in the hands of the assignee. *In re Russell* (1885), 29 Ch. D., 254. See also *Seaward v. Drew* (1894), 67 L. J. Q. B., 322.

Purchaser's lien.—See pp. 131, 132, *ante*.

Partner's lien and similar liens.—See p. 132, *ante*; cf. *Kelly v. Hutton* (1868), L. R., 3 Ch., 703; *Binney v. Mutrie* (1886), 12 App. Cas., 160, 165. An incorporated trading company has, however, no lien on the shares of a member for a debt due from him to the company. *Pinkett v. Wright* (1842), 2 Hare, 120, 130; *In re Kingstown Yacht Club* (1875), 21 L. R. Ir., 199. It should be here noticed that the lien of partners does not extend to debts incurred between the firm and its members, otherwise than in their character of members. *Re Langmead's Trusts* (1855), 20 Beav., 20; 7 DeG. M. & G., 353; *Ryall v. Rowels* (1749), 1 Ves. S., 348; 1 Atk., 165; *Malisruechi v. The Royal Exchange Association Co.* (1691), 1 Eq. Ca. Ab., 8; *Croft v. Pike* (1720), 3 P. W., 180; *disting. Smith v. DeSilva* (1775), Cowp., 469.

Where one of the joint owners of a policy paid premiums at the request and on behalf of the other co-owner he is entitled to a lien on the policy moneys for the premiums so paid. *McKerrell, In re* (1912), 2 Ch. 648. Subrogation.

Subrogation.—See pp. 331, 348, *ante*. Where executors carry on their testator's business, the creditors are entitled to be subrogated to the executor's right of indemnity which is paramount, if the business has been properly carried on, though the will contains no authority to trade. *In re Brooke* (1894), 2 Ch., 600; *Dourse v. Gorton* (1891), A. C., 190. This is said by Sir Frederick Pollock to be an entire bouleversement of the old position. 11 L. Q. R., pp. 8, 9. In Lewin, the general law on the subject is stated in the following terms: "If a trustee is authorised to carry on a business and to employ certain specific property for that purpose, the creditors of the business have a right to the benefit of indemnity and lien which the trustee has against the property devoted to the business; but this right is subject to any equities subsisting between the trustee and the *cestui que trust* of the specific property; and where the trustee is in default, and is not entitled to indemnity except upon the terms of making good the default, the creditors will have no right to indemnity except upon the same terms." Lewin on Trusts, p. 793—794. Cf. *Shard v. Ridoy* (1901), 5 C. W. N., celi; citing *Strickland v. Symons* (1884), 26 Ch. D., 247; *In re Johnson* (1880), 15 Ch. D., 548; *Roybould v. Turner* (1901), 1 Ch., 199. For the rights of a person advancing money at the request of trustees, see p. 117, *ante*; see also *Re Layton's Policy* (1873), W. N., p. 49; cf. *Clack v. Holland* (1854), 19 Beav., 262.

Charge against whom enforceable.—In the English law a charge cannot be enforced against a *bond fide* purchaser for value and the payment of an existing debt will be treated as valuable consideration within the meaning of the rule. *Taylor v. Blakelock* (1885), Charge enforced against whom.

32 Ch. D., 560. And this would also seem to be the law here. See pp. 129, 130, *ante*; see also *Churaman v. Balli* (1887), 9 All., 591; *Kishen v. Gunga* (1890), 13 All., 28; *Bheri v. Maddipatu* (1881), 3 Mad., 35; *disting. Chatti v. Pandrangi* (1883), 7 Mad., 23. The dictum to the contrary in *Abadi v. Asaram* (1879), 2 All., 162, is not supported by authority. See however the observations in *Maina v. Bachchi* (1906), 28 All., 655. It should, however, be noticed that where a charge is invalid under the law of the place where the land is situated, notice of it will not affect the rights of a person who subsequently obtains a valid charge on the property. *Martin v. Martin* (1831), 2 R. & M., 507; *Norton v. Florence Land Co* (1877), 7 Ch. D., 332, 336; see also *Liverpool Marine Credit Co. v. Hunter* (1867), 4 Eq., 62; 3 Ch., 479. For a case in which it was held that a covenant not running with the land could not be treated as a charge so as to bind the land, see *In re Drew* (1865), 35 Beav., 443.

And all the provisions hereinbefore contained as to a mortgagor, &c.—It would seem that the provisions of sec. 68 of this Act are inapplicable to charges. *Fotick v. Foley* (1887), 15 Cal., 492. It has been held in England that the owner of a rent-charge is not in the position of a mortgagee so as to be entitled to restrain waste by the tenant. *Sandemann v. Rushton* (1890), 61 L. J., 136. For the rights of debenture-holders, see pp. 105, 202, *ante*. See also *Willmott v. London Celluloid Co.* (1886), L. R., 5 Ch., 318, 322, which lays down that a change in the mode in which the business is carried on or the fact that it is carried on by a different hand will not entitle a debenture-holder to interfere. It must be shown that the security for which the holder bargained would be taken away from him; and not merely that the property charged would be different. Thus, in a recent case where the objects of a company comprised the carrying on of three distinct businesses, supplemental to one another, the court refused, at the instance of debenture-holders having a floating charge on the whole undertaking, to restrain the sale of one business. *In re Vivian & Co. v. Vivian & Co.* (1900), 2 Ch., 654; W. N., 133. See also *In re Borax Co.* (1901), 1 Ch., 326.

Floating Charge.—It has been held in England that the following characteristics constitute a floating charge within the meaning of sec. 14, sub-s. 1(d) of the Companies Act, 1900: (1) If it is a charge on a class of assets both present and future. (2) If that class is one which in the ordinary course of business would be changing from time to time. (3) If it is contemplated by the charge that until some future step is taken by the mortgagee the company may carry on the business in the ordinary way so far as concerns the particular class of assets charged. *In re Yorkshire Woolcombers, &c.* (1903), 2 Ch., 284.

Nothing in this section applies to the charge of a Trustee, Saving of rights of trustee.
&c.—See The Indian Trusts Act, 1882, sec. 32. This clause saves the right of a trustee to be indemnified out of the trust-estate for all charges and expenses lawfully incurred by him. A trustee being entitled to a charge as well upon the income as upon the *corpus* of the estate has a right to retain his expenses out of the income, until provision can be made for raising them out of the *corpus*. But he is not bound to wait until the estate has been turned into money ; but may come at any time, and say “ I claim to have my right of indemnity, I am now called upon to pay a sum of money for which I have a right of indemnity out of the trust-estate and that gives me the right in equity to have a charge against the estate.” *In re Pumfrey* (1882), 22 Ch. D., 261, 262. And where a foreclosure or sale by a trustee would destroy the trust, the court will assist him as far as it can by delivering the deeds into his custody and prohibiting any disposition of the property without previously discharging his lien. *Darke v. Williamson* (1858), 25 Beav., 622. The expenses incurred by a trustee in the execution of his office will constitute a first charge on the estate and in a suit for the administration of the fund in respect of which the expenses have been incurred, they will be paid even before the costs of the suit. But there will be no lien for expenses incurred in respect of an act done by a trustee in excess of his powers. *Leedham v. Chawner* (1858), 4 K. & J., 458. Again, a trustee cannot charge his expenses as against persons who establish the invalidity of the trust-deed ; though even in such cases he may be allowed for improvements. See *Smith v. Dresser* (1866), 1 Eq., 651 ; 35 Beav., 378 ; *Ex parte Russell* (1882), 19 Ch. D., 588, 602 ; *Dutton v. Thompson* (1883), 23 Ch. D., 278 ; *Hoods v. Axton* (1866), W. N., 207 ; *disting. Everitt v. Everitt* (1870), 10 Eq., 405 ; *James v. Couchman* (1885), 29 Ch. D., 212, 217 ; *Re Holden* (1887), 20 Q. B. D., 43. Even where trustees had been wrongfully appointed but acted *bonâ fide*, believing themselves to have been duly appointed, they were allowed their costs, charges, and expenses, notwithstanding the defect of title. *Travis v. Illingsworth* (1868), W. N., 206. But the lien can only be claimed by the trustee and not by his agents. *Lewin*, p. 796. If a person is trustee of different estates for the same *cestui que trust* under the same instrument, and he incurs expenses on account of one estate in respect of which he has no funds, Mr. Lewin thinks that he may apply to their discharge any money which has come to his hands from any other of the estates ; but he would not be justified in mixing up claims under one instrument of trust with those under another. But where different estates are held under the same instrument for different *cestuis que trust*, the trustee cannot reimburse himself from one Charge of a trustee.
Where trustee wrongfully appointed.

estate losses incurred in the course of administration of other estates. Lewin on Trusts, p. 798

Lien of
trustees.

Charge on Legacies.—Where trustees, under an erroneous view of the effect of a will, pay to parties money to which they are not entitled, the court, in administering the estate, will compel a restitution and repayment, and will give a lien on the other interests of such parties under the will, even as against an assignee for valuable consideration. *Dibbs v. Goren* (1849), 11 Beav., 483. The legacy of a trustee who has committed a breach of trust will also be subject to a lien in favour of his co-trustee. Lewin, p. 1181. It is, however, not the law that if a testator devises an estate to his debtor, the debt becomes a lien on the devised estate. *Ex parte Barff* (1848), De Gex, 613.

Lawful expenses of trustee.

What are lawful expenses.—Costs of renewing lease, and improvements. *Mill v. Hill* (1852), 3 H. L. C., 869. Premiums paid on a life-policy. *Leslie v. French* (1883), 23 Ch. D., 560. Money spent by directors in carrying on the business of the company in its ordinary course, *Re German Mining Co.* (1853), 4 DeG. M. & G., 19.

Property of trust-estate. Where trust-money is laid out together with money advanced by the trustee himself in the purchase of land, the trust-estate will be entitled to a first charge upon such land. *In re Pumfrey* (1882), 22 Ch. D., 255.

Charge on movable property.—Where a borrower agreed that the creditor should be paid first out of moneys which might be realized in execution of a certain decree which had been recovered by the former against a third party, it was held that the creditor acquired thereby a valid charge on the fund when it came into existence, and also that the fund having been distributed amongst several persons, each was liable to replace it to the extent to which it had been intercepted by him. *Palaniappa v. Lakshmanan* (1892), 16 Mad., 429; cf. *Riccard v. Prichard* (1855), 1 K. & J., 277.

As to the provisions for sale or redemption of property subject to a charge, see Order 34, rule 15 *post*.

Extinguishment of charges.

101. Where the owner of a charge or other incumbrance on immovable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

The charge or other incumbrance shall be extinguished. *ed.*—The word 'incumbrance' is not defined in the Act, but it is here ap-

parently used in the sense of mortgage. The law commissioners observe in their report: "The section relating to the merger of charges is, in the opinion of Mr. Stokes and Sir Charles Turner, in exact accordance with the English and Indian decisions on the subject." See report, dated 15th November 1879, p. 35. This statement is however hardly correct. See p. 482, *ante*; cf. *Ladhu v. Sakharam* (1875), Bom. P. J., 103; but see *Vinayak v. Dhundiraj* (1882), Bom. P. J., 351; *Velsi v. Keral* (1890), Bom. P. J., 243; *Shanker v. Nanik* (1887), 5 A. W. N., 293. For the English law on the subject see pp. 478—494, *ante*; and for the Indian cases which the law commissioners seem to have had in their minds, see the authorities cited in note 4, p. 494, *ante*. For cases decided under this Act see, in addition to those cited at pp. 482—484, 496—498, *Seetaram v. Luchman* (1898), 12 C. P. L. R., 70. In one case it has been held that where a mortgagee purchases the mortgaged property in execution of a decree for rent, he will not be entitled to proceed against the other properties of the mortgagor. But the reference made in the judgment to sec. 101 is not quite intelligible, for under that section when the incumbrance is extinguished, the debt too is gone. *Mastulla v. Jan* (1900), 28 Cal., 12; 4 C. W. N., 735; dissenting from *Goluk v. Ramsunker* (1899), 4 C. W. N., 268. A landlord purchasing a holding in execution of a rent-decree can claim the benefit of this section as against the mortgagee of the holding, whose mortgage has not been annulled, and the landlord's charge for rent under the Bengal Tenancy Act was held to subsist after his purchase; *Meherunnessa v. Sham* (1902), 6 C. W. N., 834. Where the consideration of a mortgage is either a prior mortgage or a decree under a prior mortgage, the mortgagee is entitled to set up such prior mortgage as a shield against the claim of a puisne mortgagee; *Debendra v. Mirza Abdul* (1909), 10 C. L. J., 150; *Kanhaya v. Chhida* (1910), 7 A. L. J., 985; *Rahim-un-nissa v. Badri* (1911), 33 All., 368; 8 A. L. J., 112.

When landlord purchases in execution of rent decree.

A prior mortgagee who had in the exercise of a right of pre-emption purchased the property mortgaged to him, has a right to be repaid the money due in respect of his mortgage before a subsequent mortgagee can bring such property to sale in satisfaction of his own mortgage. *Baldeo v. Uman* (1907), 32 All., 1; 6 A. L. J., 987. As to the effect of a purchaser of the equity of redemption paying off a prior incumbrance, see *Mamraj v. Ramji* (1909), 7 A. L. J., 15, and other cases noted under sec. 74, *ante*.

Or such continuance would be for his benefit.—See p. 496, *ante*; cf. *Ramessur v. Doolee Chand* (1873), 19 W. R., 422; and see 2 W. T. L. C., p. 43. Where the mortgagee institutes an action to enforce his security and purchases the mortgaged property himself, it does not necessarily follow that he intends that his title under the mortgage should merge in the equity of redemption, and he is entitled

Considerations to be made in deciding question of extinction of charges.

to rely upon his mortgage as a shield against a subsequent incumbrancer. *Bhawani v. Mathura* (1907), 7 C. L. J., 1; reversed on appeal on the ground that considerations as to the rights of prior and subsequent mortgagees did not apply in the case; (1912), 40 Cal., 89. See also *Mahalakshammal v. Sriman, &c.* (1911), 35 Mad., 642.

Similarly where a mortgagee pays off prior incumbrances it is to be presumed that he does so with the intention of keeping these incumbrances alive and using them as a shield, should occasion arise. *Gur Narain v. Shadi* (1911), 34 All., 102. In a recent case where a mortgage was made for the express purpose of paying off a prior mortgage and the money advanced was applied in discharging the prior mortgage, and the deed was given up to the subsequent mortgagee but no formal assignment of that deed was made, their Lordships of the Judicial Committee held applying the rule of justice, equity and good conscience, that the prior mortgage was kept alive for the benefit of the subsequent mortgagee. *Mahomed Ibrahim v. Ambika* (1912), 39 I. A., 68; 39 Cal., 527; 16 C. W. N., 505; 15 C. L. J., 411. It has been held by the Allahabad High Court that, in considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property, the point of time to be regarded is the date of the acquisition of the property, and the charge cannot be treated as still subsisting, simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive. *Jugal Kishore v. Ram* (1912), 34 All., 268,

The continuance of the charge must be for his benefit at the time of acquisition.

Manks v. Whiteley.

In *Manks v. Whiteley* (1911), 2 Ch., 448, in speaking of the rule of merger Parker, J., observed: "If the benefit of a charge on property and the property subject to the charge vest in the same person, then, as a general rule, equity will treat the charge as kept alive or merged according to whether it be of advantage or of no advantage to the person in whom the two interests have vested that the charge should be kept alive. But in either case clear proof of intention to the contrary will displace the general rule, merger in equity being for the most part a question of intention only, and the general rule being justified by a presumption of intention where there is no clear evidence one way or another. It is to be observed that, where it is to the advantage of the person in whom the two interests have vested that the charge should be kept alive, a person insisting on a merger is insisting on a gift, and it is quite reasonable that the onus of proving intention to give should rest on him. No doubt, if the person in whom the interests have united is a party to the transaction from which the union results, the form which this transaction takes is relevant to the question of actual intention, but where there is no clear evidence of an actual intention

in favour of merger, there would seem to be no reason why the general rule should not be applicable. There are, however, authorities to the effect that, in each of the last three mentioned cases, the general rule is inapplicable, and that equity will treat the first mortgage as merged for the benefit of the second mortgage, unless there be proof of actual intention to keep it alive. *Mantz v. Whiteley.*

"Even in cases in which the person in whom the interests have united is aware of the second mortgage, the authorities to which I am referring have sometimes led to the curious anomaly of the Courts of Equity first raising a presumption which is against the probable intention, but which must nevertheless on principle be based on the probable intention, and then laying hold of the improbability of the intention as a reason for holding on slight evidence that the presumption is rebutted.

"If, however, the authorities to which I have referred extend to cases in which the person in whom the interests have united is ignorant of the existence of the second mortgage, they must inevitably entail hardship and injustice, for they enable a stranger who has given no consideration to take advantage of another's ignorance and to secure at another's expense, from a transaction to which he was not a party, an advantage certainly never intended for him."

The facts of the case in which these remarks were made were these : In 1900 *O.* mortgaged land in Yorkshire to *A.* to secure £300 and interest, and in 1901 he gave a second mortgage upon the same property to the plaintiff. In 1905 he further charged the property to *A.* All these securities were registered. In 1907 *O.*, without disclosing the plaintiff's mortgage, offered to sell his equity of redemption to the defendant *W.* for £450. She accepted conditionally upon finding some one to advance £300 to pay off *A.*'s first mortgage. The defendant *W.* instructed her solicitor, who introduced the defendant *F.*, who agreed to advance the £300 on first mortgage. In carrying out the transaction *W.*'s solicitor acted for all parties. He did not investigate the title nor search the register. None of the parties except *O.* knew of the existence of the plaintiff's second mortgage. *F.* advanced the £300, which the solicitor paid to *A.*, from whom he obtained the title-deeds. *W.* then paid off *A.*'s further charge, and the whole transaction was completed by three contemporaneous deeds : (1) a reconveyance by *A.* to *O.* freed from *A.*'s mortgage and further charge ; (2) a conveyance by *O.* to *W.* ; and (3) a mortgage by *W.* to *F.*

Parker, J., was of opinion that, on the reconveyance by *A.* to *O.*, *A.*'s mortgage and further charge were kept alive and the plaintiff's mortgage did not become a first charge on the property in priority to those of the defendants *F.* and *W.* But the judgment has been set

*Manks v.
Whiteley.*

aside by the Court of Appeal (1912), 1 Ch., 735, Fletcher Moulton, L. J., dissenting, who says in his dissentient judgment, "The idea of voluntary merger is ridiculous where the existence of mesne incumbrances is known, because no one would voluntarily permit a merger which would let in mesne incumbrances. It is therefore a decision the sole effect of which is to give an advantage to incumbrances the existence of which is concealed from or unknown to the parties dealing with the property whether that is due to their own fault or not.

"This does not seem to me to be in accordance with the aims or principles of equity, and I am of opinion, therefore, that *Toulmin v. Steerc* (1817), 3 Mer., 210, was wrongly decided. Doubt has been thrown upon it by most eminent judges and in all courts, and indeed it has scarcely ever been referred to without some marks of disapproval. In my opinion it would have been much better that it should have been formally reconsidered years ago and overruled. The effect of the decision has only been to confuse the courts in dealing with the equities which arise when there is formally a possibility of merger either in estates or in charges."

Fletcher Moulton, L. J., agreed with Parker, J., in holding that equity might go one step further. But his colleagues thought that beneficent fiction had gone far enough and should not be stretched any further. It is stated in the Law Quarterly Review that the opinion of conveyancers inclines to support Parker, J., 28 L. Q. R., 229. For a full discussion of this case see 28 L. Q. R. 348.

A fortiori, a *bond fide* mortgage does not become merged in a deed of sale by the mortgagor to the mortgagee which is found to be a colorable sale for the purpose of defeating execution-creditors. *Choturam v. Dala* (1880), Bom. P. J., 215.

Notice and Tender.

Service or
tender on or
to agent.

102. Where the person on or to whom any notice or tender is to be served or made under this chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where the person or agent on whom such notice should be served cannot be found in the said district or is unknown to the person required to serve the notice,

the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such Court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

District.—The word has not been defined in this Act, but see the definition in sec. 2 of the Code of Civil Procedure. For cases arising in the scheduled districts, see *Ram Ratan v. Lalla Prasad* (1895), 17 All., 483.

The Act does not provide how the notice required by the first paragraph of the section is to be served. Cf. sec. 67 of the Conveyancing Act, 1881.

103. Where, under the provisions of this chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served, or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he

Notice, etc.
to or by
person in-
competent to
contract.

XIV of 1882. were competent to contract; and the provisions of Chapter XXXI of the Code of Civil Procedure^(a) shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

The legal curator of the property, &c.—This somewhat unfamiliar term is probably intended to include all persons entrusted with the management of the property of persons labouring under any legal disability.

Such notice may be served, &c.—The words 'on or by' should be added after the word 'served' in this section. A mortgagor making deposit under sec. 83 cannot be said to have completely performed his part, until he has procured the appointment of a guardian *ad litem* for receiving service of notice of the deposit and to take it out of court. *Pandurang v. Mahadaji* (1902), 27 Bom., 23.

Power to
make rules.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this chapter.

Rules framed under this section.—The following rules have been made under the provisions of this section by the High Court of Bengal with regard to its original jurisdiction (see *Calcutta Gazette*, dated 6th August 1884, p. 834). and with the exception of Rules 12, 16, 17 and 18 have been adopted by the High Court of Madras. See *Fort St. George Gazette* Supplement, dated 16th June 1891.

Calcutta High
Court rules.

1. Every application under sec. 83 shall be made by a verified petition, stating the facts.

2. Unless otherwise ordered, there shall be paid into Court, in addition to the sum deposited under sec. 83, or any subsequent section, a sum sufficient to provide for the fees and charges of the Accountant-General and the Bank of Bengal, and for the mortgagee's costs of obtaining payment out of Court; and also when such payment is made under sec. 83, a further sum to provide for the mortgagee's cost of transferring the property, and causing such transfer to be registered; such costs to be estimated and certified by the Taxing Officer.

(a) This reference to Ch. XXXI of the Code of Civil Procedure should now be read as applying to Order 32

of Act V of 1908.—See sec. 158 of the latter Act.

3. Every order for payment of money into Court under sec. 83, shall specify the sums to be paid, and the purpose for which each sum is intended. Calcutta High Court rules.

4. Unless otherwise ordered, the applicant or his attorney shall serve, or cause to be served, the notice to be given under sec. 83.

5. When money is paid into Court under sec. 86, or under any subsequent section, the person making such payment shall forthwith give written notice thereof to the person or persons on whose account such payment is made.

6. Every application by a mortgagee to obtain payment by money out of Court shall be by a verified petition.

And when made, under sec. 83, it shall be shown whether the property has been transferred and [where the applicant was in possession] possession delivered up, free from encumbrance and whether the transfer has been registered. The documents of title which were held by the applicant, shall also be accounted for.

Or, when made under sec. 86, or sec. 92, it shall be shown that the provisions of such section have been complied with.

7. Every application under the last preceding rule shall be on notice to the person by whom, or on whose behalf, the money was paid, or to his attorney, unless the Court shall think fit to dispense with such notice.

8. Unless otherwise ordered whenever any notice or order is served under the Act or under these rules, an affidavit or affirmation in proof of such service shall be filed as soon as possible thereafter.

9. Where it shall appear that previous to any payment into Court under sec. 83, or any subsequent section, a sufficient tender was made to and refused by the mortgagee, he shall not be allowed to obtain payment of the amount deposited in Court to meet his claim, without deduction of the fees and charges of the Accountant General and the Bank, nor shall be allowed his costs of obtaining such payment. Except as aforesaid, or when otherwise ordered, the mortgagee shall be allowed all costs properly incurred by him.

10. If through default on the part of the plaintiff, it becomes necessary to obtain an enlargement of time under sec. 87, no interest shall be allowed for the enlarged time.

11. On an application for payment of money out of Court, under sec. 83, or any subsequent section, by a mortgagee, who has complied with the orders of the Court and the provisions of the Act and of these rules so far as they relate to him, or apply to his case, and has, when required so to do, transferred the property and possession, free from encumbrance, and caused such transfer to be registered, and accounted for the documents of title which were held by him.

Calcutta High
Court rules.

the Court shall make such order or orders as to it shall seem fit for the disposal of the capital sum and interest thereon, and of the fund for costs and expenses.

12. Every decree for sale under the Act shall direct that, if the proceeds of sale shall not be sufficient to satisfy the decree, the defendant [if the original mortgagor] shall personally [or if the representative in estate of the original mortgagor, shall out of his estate] pay the amount of the deficiency.

13. Every final order for foreclosure (a) under sec. 87 or sec. 93 shall direct that possession of the property be given to the mortgagee, except where he is already in possession. It shall also, at the option of the mortgagee, be drawn up with a recital of the decree and the proceedings had thereunder, and with a full description of the property, or without any such recital of the description.

14. Where immovable property is sold under sec. 88, or any subsequent section, the purchaser may, on application to a Judge in Chambers, obtain a certificate of sale as evidence of the title to the property sold to him and may also, at his own costs, obtain a conveyance from the mortgagor.

15. Every enforceable order made under sec. 83 may be enforced under the provisions of the Code of Civil Procedure, and shall for that purpose be deemed to have been made in a suit instituted under that Code.

16. Rules 45 and 46 of the rules of the 1st August 1877 [Rules 431 and 432, Belchambers' R. & O., pp. 200, 201], relating to sales by the Registrar, are hereby repealed.

From Rule 50 of the same rules shall be omitted the words "unless otherwise ordered the costs of such application in the case of a person under disability shall be part of the costs of the sale, and in other cases shall be borne and paid by the defaulting party."

At the end of Rule 58 of the same rules shall be added the words "or the grant to him of a certificate of sale."

17. Rules 387 to 449 [Belchambers' R. & O., pp. 189 to 205], relating to sales by the Registrar as modified by the last preceding rule, and so far as they are applicable, shall apply to all sales by the Court under secs. 88 and 89 or 92 and 93. (b)

(a) The order here referred to is described in sec. 87 as an 'order absolute for foreclosure.'

(b) The purchaser could not be put

into possession under s. 318 of the Civil Procedure Code, 1882. *Santa Money v. Ardor* (1894), 3 C. W. N., XII.

18. The money rules 597 to 641 [Belchambers' R. & O., pp. 240 to 253] shall also, so far as they are applicable, apply to the payment of money into Court, and out of Court under these rules. Calcutta High Court rules.

19. The form set forth in the annexed schedule shall be followed, with such variations as the circumstances of each case may require.

Notice under section 83.

IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM
IN BENGAL.

ORDINARY ORIGINAL CIVIL JURISDICTION.

To *B*.

Whereas *A* has, under sec. 83 of Act IV of 1882, deposited in Court Rs. 10,000 as the amount remaining due on the mortgage to you, dated day of 19 , and Rs. 100 for the commission and charges of the Accountant-General and the Bank of Bengal and Rs. 500 to provide for such necessary costs and expenses as you may incur, [and whereas it is alleged that a sufficient tender was previously made to you]:—You are hereby informed that the Court, upon being satisfied that you have retransferred the property comprised in the said mortgage and [where *B* is in possession] delivered up possession thereof to the said *A*, and have also delivered up to the said *A*, or deposited in Court or accounted for, all documents in your possession or power, or for which you are responsible, relating to the said property, the Court will make such order as to it shall seem fit for the payment to you of the said sum of Rs. 10,000 [less, where a tender was made, the commission and charge of the Accountant-General and the Bank of Bengal] with all costs and expenses to which you may be entitled.

Dated the day of , 19

Registrar.

The Calcutta High Court has since made some additions to the foregoing rules. Rule 555 in Belchambers' Rules and Orders has been amended by substituting the words "the period allowed for payment by sec. 86, 88 or 92 of the Transfer of Property Act, IV of 1882" for the words "the date of the decree," and the following rule has been passed with effect from the 1st day of March 1886:—

Every certificate or report of the Registrar or other referee stating what is due to the mortgagee in a mortgage-suit, shall, on being confirmed by effluxion of time or otherwise, be submitted in open Court to a Judge exercising original Civil Jurisdiction, in order that it may be countersigned by him, and the period for payment under sec. 86,

Calcutta High
Court rules.

88 or 92 of the Transfer of Property Act shall run from the date of such countersignature, which shall be deemed to be a declaration of the amount under the provisions of those sections. See *Calcutta Gazette*, 10th March 1886.

Rule 555 as now amended runs thus :—Unless otherwise ordered interest shall be computed on a mortgage at the rate mentioned therein until the end of six months from the period allowed for payment by section 86, 88 or 92 of the Transfer of Property Act, 1882, or until the end of any further period to which the time may be enlarged. Such interest shall be added to the principal and thereafter interest shall be computed on the aggregate amount at the rate of six per cent. per annum.

CIRCULAR ORDER No. 13 [a] dated 27th April 1892, which embodies the rules framed by the Calcutta High Court for the Provincial Courts, runs thus :—

(1) An application under sec. 89 of the Transfer of Property Act shall be made by means of a verified petition stating the facts.

(2) If the Court passes an order directing that the property, or any part of it, shall be sold, it shall issue a proclamation of sale and cause it to be served in the manner provided by the Code of Civil Procedure for the service of proclamations regarding the sale of immovable property.

(3) Secs. 286 to 294, both inclusive, of the Code of Civil Procedure, shall apply to such sales.

(4) Secs. 304 to 319, both inclusive, and secs. 328 to 335 of the Code of Civil Procedure shall apply to proceedings subsequent to sale under a mortgage.

(5) The procedure to be followed in the execution of a decree passed under sec. 90 of the Transfer of Property Act is that prescribed by the Code of Civil Procedure.

Rules of the High Court of Judicature at Madras in its ordinary original jurisdiction which came into force on the 1st day of September, 1902.

ORDER XXIX.

MORTGAGES AND CHARGES.

A.—General.

Madras High
Court rules.

374. Every plaint shall contain an allegation that the plaintiff has caused a search to be made in the office of the registrar of assurances

(a) See *Calcutta Gazette* of 13th April 1892, Part I, p. 414, and *Assam Gazette* of 16th April 1892, Part III, p. 272.

of the district, or sub-district, in which the immovable property comprised in the mortgage or subject to the charge sued on, is situate for a period of not less than 12 years prior to the date of presentation of the plaint, and that he is not aware that any person, other than the persons made parties to the suit, has any interest in the said property. The certificate of the registrar of assurances stating the result of the search, shall be filed with the plaint.

Madras High
Court rules.

The costs of making the search and filing the certificate shall be costs in the cause : Provided that a plaint which does not comply with the above provisions shall be returned for amendment under s. 53 (b) (2) of the Civil Procedure Code and shall be rejected under s. 54 (d) of the Code if it be not amended within the time fixed.

375. The plaint shall be in one of the forms, Nos. 47 to 50 inclusive, with such variations, as circumstances may require.

376. Where there are several parties to a suit claiming successive charges or incumbrances on the mortgaged property the Court shall determine their respective rights and priorities, and insert in its decree a declaration with respect thereto as in form No. 51.

377. In a suit for sale by a second or subsequent mortgagee, the plaintiff shall, in his plaint, aver that he is willing to redeem the prior mortgagee or mortgagees ; and, unless the Court otherwise orders, the decree shall be drawn up in form No. 52 to form No. 55, and shall not be made subject to the claims or interests of the prior mortgagee or mortgagees.¹

378. The Court shall determine whether the defendant is responsible personally, and to any and what extent, for the repayment of the mortgage-moneys, and a declaration with respect thereto shall be interested in the decree as in forms Nos. 57 and 58.

379. If, in any suit or matter, it is found necessary to take an account, an *interim* decree shall be drawn up in form No. 56, with such variations as circumstances may require.

380. A sale of mortgaged property shall be conducted in manner prescribed by Order XVIII : Provided that, if leave to bid is granted to the plaintiff or applicant, and, unless the Court otherwise orders, the sum allowed to be bid, shall be not less than the whole amount then due for principal, interest and costs ; and, in the event of the property being sold in lots, not less than the market-value of each lot in respect of which the bid is made.

381. If a money decree only is obtained, the decree shall not direct execution to issue against the mortgaged property.

¹ See, however, O. 34, r. 1, of the Code of Civil Procedure.

B.—SIMPLE MORTGAGES AND CHARGES.

Suits for Sale.

Madras rules.

382. At the trial of the suit the Court shall, if possible, ascertain the amount of principal and interest which will be due under the mortgage on the day fixed for payment, and shall determine the extent of the liability of the defendant therefor. A decree shall then be drawn up in form No. 57, and the case shall be ordered to be posted in chambers on the 1st convenient day after the day limited for payment by the defendant.

383. On the adjourned day—

(1) If the defendant has paid the amount due under the decree into Court, the Court may pass an order in Form No. 59.

(2) If the defendant has made default in payment, the Court may, on the oral application of any party for the sale of the mortgaged property, pass an order for sale in Form No. 60.

(3) If default being made by the defendant, the plaintiff does not appear and the defendant appears, or if neither party appears, the Court may adjourn the suit and direct that no order for sale shall be passed except on notice to the other party

384. If an order for sale is passed on the application of the defendant the Court may direct that the defendant shall have the conduct of the sale and be entitled to the further costs of the proceedings.

385. If at any time it is made to appear to the judge that the plaintiff, or other party having the conduct of the sale, has failed to comply with any order of the Court or any of the provisions of these rules, or is not proceeding with due diligence, the court may give the further conduct of the suit to any other party ; or may refuse to allow to the plaintiff or such other party any further costs of suit, or interest on the mortgage-monies.

386. If the sale is confirmed, the judge may pass an order in Form No. 61 or 62.

387. (1) A person other than the party to the suit, who claims an interest in the mortgaged property, (hereinafter called "the claimant,") may apply by summons in chambers to be made a party.

(2) If the judge finds that the claimant has an interest in the mortgaged property and should have been joined a party to the suit, (and the application is made before decree has been passed therein) the judge may add the claimant as a party and raise such further issues as may be necessary, or may grant leave to the plaintiff to withdraw from the suit, or may dismiss the suit ; but if the application is made subsequently to the decree, the judge may make such order as regards

the application of the proceeds of any sale, or such other order as may seem fit.

(3) If the judge finds that the claimant has not such an interest in the mortgaged property as entitles him to be joined as a party to the suit, he may pass an order that the sale of the mortgaged property is to be subject to the interest, if any, of the claimant, and in such case the proclamation of sale shall recite the said order, and the interest in the property claimed by him; or the judge may dismiss the application, and make such order as to the costs thereof as he thinks fit.

SUITS FOR REDEMPTION.

388. At the trial of the suit, the court shall determine whether the plaintiff is entitled to redeem the mortgaged property, and if possible, shall ascertain the amount of principal and interest, which will be due under the mortgage on the day fixed for redemption, and a decree shall then be drawn up, in Form No. 63, and the case ordered to be posted in chambers on the 1st convenient day after the day fixed for payment by the plaintiff.

389. If it is found necessary to make an account, an *interim* decree shall be drawn up in Form No. 56; and, at the adjourned hearing, the court or a judge may declare the amount due on taking the account, and, if the balance is found to be against the plaintiff, may appoint a day for payment by him, and declare the aggregate amount of principal, interest and costs due on that day, and thereupon an order shall be drawn up in Form No. 64, and the suit shall be adjourned to a day as soon as possible after the day so fixed. If the balance is found against the defendant, the court or a judge may at once pass a decree directing payment thereof to the plaintiff, and, if the defendant is in possession of the mortgaged property, directing delivery thereof to the plaintiff, and payment of mesne profits, and may make such order as to the costs of the suit as is just.

390. If the plaintiff proves that a valid tender of the mortgage-moneys has been made, the Court or a judge may pass a decree, as in Form No. 65.

391. On or before the day to which the case is posted the plaintiff may apply to the judge by summons in chambers, to appoint a further day for payment, and thereupon the judge may, for sufficient cause and upon such terms as he thinks fit, postpone payment to a fixed day, and adjourn the further hearing to a day as soon as possible after such day as in Form No. 66.

392. If on the adjourned day, it appears that the mortgage-moneys have not been paid by the plaintiff, and if no further time for payment

Madras rules. is granted, the defendant may apply for the sale of the mortgaged property, and thereupon the judge may pass an order for sale as in Form No. 67.

C.—ENGLISH MORTGAGES, AND MORTGAGES BY CONDITIONAL SALE

Suits for foreclosure or sale.

393. At the trial of the suit, the Court shall, if possible, ascertain the amount of principal and interest which will be due under the mortgage on the day fixed for payment, and a decree shall be drawn up in Form No. 68 ; and the case shall be ordered to be posted in chambers on the first convenient day after the day limited for payment by the defendant.

394. When there are several successive incumbrancers the Court may fix a day for payment by the defendants, or any of them, or may allow several periods of redemption to the several incumbrancers, in succession, according to their respective priorities ; as in Forms No. 69 and 70.

395. Unless otherwise ordered, a decree absolute for foreclosure shall be drawn up in Form No. 71 ; and a final decree upon redemption by the defendant shall be drawn up in Form No. 72.

396. If, in a suit other than on a mortgage by conditional sale, the Court, upon the application of any party, thinks fit to pass an order for sale of the mortgaged property in lieu to a decree for foreclosure, the order may be made conditional upon the applicant paying into Court within a fixed period, a sum sufficient to provide for the expenses of the sale, and upon the applicant other than the plaintiff, also paying into Court the amount of interest at the date of the application due on the principal amount, the estimated costs of the plaintiff of the sale, and the costs of the suit already incurred by the plaintiff, or any of the said sums. If the application is made by the defendant and unless otherwise ordered, the order shall direct that, in default of compliance with any of the said conditions, and of payment of the mortgage-moneys within the period fixed by the Court, the defendant shall be foreclosed, as in Form No. 73.

Subject to the foregoing provisions the rules relating to a suit for sale under a simple mortgage shall apply to a suit or decree for sale under an English mortgage.

• SUITS FOR REDEMPTION.

397. If it is not necessary to take an account, and unless the Court otherwise orders an *interim* decree for redemption by the mortgagor

shall be drawn up in Form No. 74, and the suit shall be ordered to be posted in chambers on the first convenient day after the day fixed for redemption for further consideration. Madras rules.

398. If the plaintiff pays the amount fixed by the *interim* decree, a final decree may be made similar to that in Form No. 72.

399. If the plaintiff makes default in payment, and the mortgage is not by conditional sale, the Court may, on the application of the defendant, pass a decree absolute for foreclosure similar to that in Form No. 71, or an order for sale of the mortgaged property, or a sufficient part thereof as in Form No. 67.

If the mortgage is by conditional sale, the Court may pass a decree similar to that in Form No. 71.

400. In taxing the costs awarded by the *interim* decree, the taxing officer may include a cost of the stamped paper and other costs necessary for the preparation of the deed of reconveyance of the mortgaged property or of acknowledgment of payment of the mortgage-moneys.

401. Subject to the foregoing provisions, the rules relating to a suit for the redemption of a simple mortgage shall, so far as applicable, apply to a suit for the redemption of an English mortgage, a mortgage by conditional sale or usufructuary mortgage.

D.—DEPOSIT IN COURT OF MORTGAGE-MONEYS.

402. When a mortgagor desires under the provisions of the Transfer of Property Act, 1882, to deposit in Court the amount due on his mortgage, he shall file an affidavit, entitled in the matter of the mortgage and the said Act, and stating the facts of the case.

403. (1) Unless otherwise ordered, the mortgagor shall in addition to the amount due on his mortgage, deposit in Court a sum sufficient to provide for the costs of the mortgagee, of obtaining payment out of Court of the mortgage-moneys, and of reconveying the mortgaged property, or executing an acknowledgment of the discharge of the mortgage, as the case may be, and of registering the said reconveyance or acknowledgment in the office of the registrar of assurances of the district or sub-district, in which the mortgaged property is situate.

(2). If, by the terms of the mortgage, the mortgagee is entitled to notice before payment or tender of the mortgage-moneys the mortgagor shall, in addition to the said sums, deposit in Court a sum sufficient to provide for any subsequent interest to which the mortgagee may be entitled.

404. Notice of the deposit shall be in Form No. 75, and shall, subject to the provisions of s. 102 of said Act, be taken out and served

Madras rules. on the mortgagee in manner prescribed for service of summons on a defendant. The notice shall require the mortgagee to deposit in Court the mortgage-deed and all documents in his possession or power relating to the mortgaged property.

405. The Court by endorsement on the affidavit or otherwise may order the deposit to be received. Such order shall specify the several sums to be paid into Court, and the purpose for which each sum is intended.

406. Every application by a mortgagee for payment out of any monies paid into court, under s. 83 or s. 102 of the said Act, shall be by original petition, as in Form No. 76, entitled in the matter of the mortgage, and shall specify the documents in his possession or power relating to the mortgaged property ; and shall be accompanied by the mortgage-deed and the said documents, and a draft deed of reconveyance of the mortgaged property, or acknowledgment of discharge of the mortgage, as the case may be. The registrar shall appoint a day for the hearing of the petition and notice thereof in Form No. 77, shall be served on the mortgagor, not less than five days before the said day.

407. The draft deed of reconveyance, or acknowledgment, shall, if so required by either party, be settled by the registrar and, if approved, shall be signed by him as approved.

At the hearing, the Court may, if the provisions of the said Act and these rules have been complied with, pass an order that upon the mortgagee bringing into Court a reconveyance of acknowledgment of discharge, as agreed on or settled by the registrar, duly stamped and executed, the moneys in Court be paid out to the mortgagee.

408. If it is made to appear to the Court that previously to payment of any moneys into Court, under s. 83 or s. 102, of the said Act a sufficient tender was made to, and refused by the mortgagee, he shall not be allowed his costs of obtaining payment out of the said moneys except as aforesaid, or unless the Court otherwise orders, a mortgagee shall be allowed all costs properly incurred by him, and he shall not be compelled to execute the reconveyance or acknowledgment until such costs have been paid.

Forms appended to the Rules of the Madras High Court.

FORM NO. 47.

Rule 375. *Plaint in a suit by mortgagee for personal decree and sale.*

(CAUSE-TITLE.)

Plaint.

A. B., the above-named plaintiff, states as follows :—

1 & 2. Proceed as in paragraph 1 and 2 of Form No. 5.

3. By way of security for moneys advanced to, and owing by, ^{Madras Forms.} the defendant to the plaintiff, an instrument of mortgage was executed by the defendant in the plaintiff's favour on the day of , mortgaging certain property situated within the jurisdiction of this Court and described in the schedule hereto annexed.

4. The plaintiff has caused a search to be made in the register of assurances of the sub-district in which the said property is situate, and is not aware of any incumbrances on the said property, other than those herein mentioned, or of any person possessing an interest in the said property, other than those who are made parties to this suit.

5. There is now due from the defendant to the plaintiff on the said mortgage the sum of Rs. (here enter aggregate amount of principal and interest), of which Rs. is principal and Rs. interest.

6. The plaintiff prays—

(a) the Court will order the defendant to pay to him the said sum of Rs. with such further interest as may accrue between the filing of the plaint and the day of payment, and also the costs of this suit on some day to be named by the Court, and in default that the said property may be sold, and the proceeds (after defraying thereout the expenses of the sale) applied in and towards the payment of the amount of the said principal, interest and costs ;

(b) that, if such proceeds shall not be sufficient for the payment in full of such amount, the defendant may be ordered to pay to the plaintiff the amount of the deficiency with interest thereon at the rate of six per cent. per annum until realization, and

(c) that for that purpose all proper directions may be given and accounts taken by the Court.

ENTER VERIFICATION AS IN FORM NO. 5.

Serial Number.	Description of the mortgaged property.	Incumbrances.		
		Date.	Short description.	Owner.

(Signed) E. F.,

Pleader of the plaintiff,

(Signed) A. B.,

Plaintiff

FORM NO. 48.

Madras Forms. Rule 375. *Plaint in a suit upon a mortgage of ancestral property or of the property of an undivided Hindu family.*

(CAUSE-TITLE.)

Plaint

1, 2 & 3. Proceed as in paragraphs 1, 2 and 3 of Form No. 47.

4. (In the case of a mortgage of ancestral property by the Hindu father of sons.) The defendant *A* is the father of the defendant *B*, and he was previously to the execution of the said mortgage indebted to the plaintiff in the amount for which the said mortgage was given as security. (Or, in the case of a mortgage by the manager of an undivided Hindu family.) The defendant *A* is the manager of the Hindu family consisting of himself and the defendants *B*, *C* and *D*, and as such manager he executed the said mortgage in respect of moneys advanced to him for the purpose of the family.

5 & 6. Proceed as in paragraphs 4 and 5 of Form No. 47.

7. The plaintiff prays—

(a) that the Court will order the defendants to pay (continue as in Form No. 47);

(b) that, if such proceeds shall not be sufficient for payment in full of the said amount, the defendants may be ordered, the defendant *A*, personally, and the defendants *A* and *B*, out of the ancestral property belonging to them (or in the case of a mortgage by the manager of an undivided Hindu family), the defendants *A*, *B*, and *C*, out of the property of the said Hindu family, to pay to the plaintiff (continue as in Form No. 47).

FORM NO. 49.

Rule 375. *Plaint in a suit for redemption of mortgage.*

(CAUSE-TITLE.)

Plaint.

A. B., the above-named plaintiff, states as follows :—

1 & 2. Proceed as in paragraphs 1 and 2 of Form No. 5.

3. By way of security for moneys advanced to, and owing by, the plaintiff to the defendant, an instrument of mortgage was executed by the plaintiff in the defendant's favour on the day of , mortgaging certain property situated within the jurisdiction of this Court and described in the schedule hereto annexed.

4. The plaintiff has caused a search to be made in the register *Madras Form.* of assurances of the sub-district in which the said property is situated, and is not aware of any incumbrances on the said property, other than those herein mentioned, or of any person possessing an interest in the said property, other than those who are made parties to this suit.

5. There is now due from the plaintiff to the defendant on the said mortgage the sum of Rs. , of which Rs. is principal and Rs. is interest.

6. The plaintiff is ready and willing to pay such sum as may be found due on the footing of the said mortgage.

7. The plaintiff prays—

(1) that an account may be taken of the amount due to the defendant for principal, interest and costs ;

(2) that upon payment of the same by the plaintiff, the defendant be directed to (a) deliver to the plaintiff the mortgage instrument and all the documents in his possession relating to the property, (b) deliver possession of the said property to the plaintiff, and (in case the property exceeds Rs. 100 in value (c) to execute and register an acknowledgment in writing to the effect that the interest created by the mortgage has been extinguished.

8. (Enter verification as in Form No. 5).

SCHEDULE.

(See Form No. 47).

FORM NO. 50.

Rule 375. *Plaint of second mortgagee seeking to redeem the prior mortgagee.*

1 to 5. Proceed as in Form No. 47.

6. The plaintiff admits that the mortgage in favour of the 1st defendant, dated the day of , has priority over his interest in the said property.

7. The plaintiff prays—

(a) that an account may be taken of the amount due to the 1st defendant, under his mortgage, dated the day of , for principal and interest ;

(b) that the plaintiff may be at liberty, by a day to be fixed by the Court, to pay the said amount and the costs of 1st defendant of this suit into Court, and that thereupon the said 1st defendant may be ordered to bring into Court

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the said mortgage-instrument and all documents in his possession or power relating to the property, and an acknowledgment in writing that the interest created by the said mortgage has been extinguished.

- (c) that the 2nd defendant (the mortgagor) may be ordered to pay to the plaintiff the said sums so paid into Court and the sum of Rs. (the amount due under plaintiff's mortgage) with such further interest as may accrue, on the principal sum so paid into Court from the said day so fixed for payment, and on the said principal sum of Rs. from the filing of this plaint until payment, and also the costs of this suit, on some day to be fixed by the Court, and in default (continue as in Form No. 47).

FORM NO. 51.

Rule 376. *Decree in a suit by a first mortgagee against a subsequent mortgagee or mortgagor.*

(Formal parts as in Form No. 52.)

It is declared that the several amounts due on the day of are to the plaintiff Rs. for principal and Rs. for interest, making in all the sum of Rs. *X* and to *C. D.*, the 1st defendant (the subsequent mortgagee) Rs. for principal and Rs. for interest making in all the sum of Rs. and it is further declared that there is due to the plaintiff the sum of Rs. *A* and to the 1st defendant the sum of Rs. *B* for their respective costs of this suit.

(Insert declarations as to the liability of the mortgagor for the said mortgage sums, see Form No. 58) and it is further declared that, the plaintiff is entitled to payment of the amount due to him in priority to the 1st defendant (or if there are several subsequent mortgagees that the several parties hereto are entitled to payment of the sums due to them respectively in the following order:—first, the plaintiff, secondly, the 1st defendant, thirdly, the 2nd defendant, etc.) and it is decreed as follows:—

1. The said 1st defendant and the said 2nd defendant shall be at liberty on or before the said day of to pay into Court the said sums of Rs. *X* and Rs. *A*.

2. If payment shall be made as aforesaid, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged premises in the plaint mentioned, and also an acknowledgment

signed by him of the receipt of the said sums, and that all interest in the said premises created by the said mortgage has been extinguished, and thereupon he shall be at liberty to apply for payment over to him of the said sums, (if the plaintiff, the first mortgagee, is in possession) and shall put the defendant in possession of the said property. Madras Forms.

3. In default of payment in as aforesaid, the said premises or a sufficient part thereof shall be sold and the net sale-proceeds shall be paid into Court and applied first in payment of the amount due to the plaintiff together with such further interest and costs as may be allowed by the Court, secondly in payment to the 1st defendant of the amount due to him together with such further interests and costs as may be allowed by the Court, and the balance, if any, shall be paid to the 2nd defendant.

And the further consideration of this suit is adjourned to, etc.

FORM NO. 52.

Rule 377. *Decree in a suit by a second mortgagee against the 1st mortgagee and the mortgagor.*

(CAUSE-TITLE.)

Claim under a mortgage of immovable (or movable property), dated the day of , for Rs. principal, and Rs. interest thereon to the day of , and further interest at Rs. per cent. per annum; for sale in default in payment; for a decree against the defendant personally; for any deficiency on such sale, and for costs.

This suit coming on this day for final disposal in the presence of Mr. , Vakil for the plaintiff, and Mr. , Vakil for the defendant: It is declared that the several amounts due on the day of are, to the plaintiff Rs. for principal, and Rs. for interest, making in all the sum of Rs. ; and to C. D., the 1st defendant (the first mortgagee) Rs. for principal, and Rs. for interest, making in all the sum of Rs. ; and it is further declared that there is due to the plaintiff the sum of Rs. *a* and to the said 1st defendant the sum of Rs. *b* for their respective costs of this suit.

(1) *(Where defendants are legal representatives of a deceased mortgagor):—*

And it is further declared that A. B. and X. Y., the defendants herein, are liable for the said amount to the extent only of the property of E. F., deceased, come to their hands as his legal representatives.

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(2) (*Where defendants are Hindu father and sons*):—

And it is further declared that *A B*, the 1st defendant, is personally liable for the said amount, and that *X Y.*, and *E F*, the 2nd and 3rd defendants, are liable only to the extent of the ancestral property belonging to them and the said *A. B.*

(3) (*Where defendants are the managers and the members of an undivided Hindu family*).—

And it is further declared that *A. B.*, the 2nd defendant, is personally liable for the said amount, and that *X. Y.*, and *E. F.*, the 3rd and 4th defendants, are liable only to the extent of the property of the undivided Hindu family, consisting of them and the said *A. B.*

(4) (*Where, under the mortgage, the mortgagor is not personally liable*):—

And it is further declared that, under the terms of the said mortgage, *A. B.*, the defendant, is not personally liable for the repayment of the said amount.

(5) (*Where the Personal remedy is barred by limitation*):—

And it is further declared that the remedy of the plaintiff against *A. B.*, the defendant personally, is barred by limitation, and that he is entitled only to repayment out of the mortgaged property.

And it is further declared that the plaintiff is entitled to payment of the amount due to him after the 1st defendant who has priority (or, if there are several subsequent mortgagees, that the several parties hereto are entitled to payment of the sums due to them respectively in the following order:—first, the 1st defendant, secondly, plaintiff, thirdly, the 2nd defendant, etc).

And it is decreed as follows:—

1. On or before the day of the plaintiff shall be at liberty to pay into Court the said sums of Rs. and Rs. (insert the amounts due to the 1st mortgagee for principal and interest and for costs): and the 2nd defendant (the mortgagor) shall be at liberty to pay into Court the said sums of Rs. (insert the amounts due to the 1st mortgagee, and to the plaintiff, for principal, interest and costs).

2. If default is made in payment of the said sums of Rs. and Rs. (insert amounts due to the 1st mortgagee) the 1st defendant shall be at liberty to apply for the sale of the mortgaged property; but, if such payment is made, the 1st defendant shall bring into Court all documents in his possession or power relating to the mortgaged premises in the plaint mentioned, and also an acknowledgment signed by him of the receipt of the said sums, and that all interest in

the premises created by the said mortgage has been extinguished, and thereupon he shall be at liberty to apply for payment out to him of the said sums [(if the mortgagee is in possession) and shall put the defendant into possession of the property]. Madras Forms.

3. If the plaintiff does, and the 2nd defendant does not make the said respective payments, then the mortgaged property, or a sufficient part thereof, shall be sold, and the net sale-proceeds shall be paid into Court and applied in payment to the plaintiff of the said sums in the first paragraph mentioned, together with such subsequent interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the 2nd defendant.

And the further consideration of this suit is adjourned to

FORM NO. 53.

Rule 377. *Decree in a suit by sub-mortgagee against the original mortgagee and the mortgagor.*

(CAUSE-TITLE.)

This suit coming on this day, etc. It is declared as follows : |

1. There is now due to the 1st defendant (the original mortgagee) under his mortgage the sum of Rs. for principal, and Rs. for interest, and on the day of there will be due the further sum of Rs. for interest at the rate of Rs. per cent. per annum, making in all the sum of Rs. X, and for his costs of this suit of Rs. Y.

2. There is now due to the plaintiff under his derivative mortgage the sum of Rs. for principal, and Rs. for interest, and on the day of there will be due the further sum of Rs. for interest at the rate of Rs. per cent. per annum, making in all the sum of Rs. Z, and for his costs of this suit the sum of Rs. A.

3. (Insert declarations as to liability of the defendants as in Form No. 58).

And it is decreed as follows :—

4. The 2nd defendant (the mortgagor) shall be at liberty on or before the said day of to pay into Court the said sums of Rs. X, Rs. Y, and Rs. A (the costs of the plaintiff) and the 1st defendant shall be at liberty on or before the same day, to pay into Court the said sums of Rs. Z, and Rs. A (the amounts due to the plaintiff).

5. In the event of payment by the 2nd defendant, as aforesaid the plaintiff and the 1st defendant shall each bring into Court all docu-

Madras Forms. ments in his possession or power relating to the mortgaged premises, and also an acknowledgment, etc., and thereupon the petitioner shall be at liberty to apply for payment out to him of the said sums of Rs. Z and Rs. A, and the 1st defendant for payment of the balance.

6. In default of payment in by the 1st and 2nd defendants as aforesaid, the property, or a sufficient part thereof, shall be sold, and the net sale-proceeds shall be paid into Court and applied first in payment to the plaintiff of the said sums of Rs. Z and Rs. A, and such further interest and costs as may be allowed by the Court (but so that the aggregate amount of principal and interest shall not exceed the amount of principal and interest due to the 1st defendant); secondly, in payment to the 1st defendant of the excess of the said sums of Rs. X and Rs. Y, and such further interest and costs as may be allowed by the Court over the aggregate amount paid to the plaintiff, and the balance, if any, shall be paid to the 2nd defendant.

7. In the event of payment by the 1st defendant and in default of payment by the 2nd defendant as aforesaid, the plaintiff shall bring into Court all documents (continue as in paragraph 5 but in place of the last sentence insert), and the 1st defendant shall be at liberty to apply for the sale of the said property, and thereupon the same or a sufficient part thereof shall be sold and the net sale proceeds shall be applied in payment of the said sums of Rs. X and Rs. Y, and such further interest and costs as aforesaid and the balance shall be paid to the 2nd defendant.

And the further consideration, etc.

FORM NO. 54.

Rule 377. Decree in a suit by a sub-mortgagee where the amount due on the derivative mortgage exceeds the amount due on the original mortgage and the former contains a covenant to pay the mortgage moneys.

(Commence as in Form No. 53 to the end of paragraphs 1 and 2).

3. The amount due to the plaintiff for principal and interest exceeds the due to the 1st defendant (the original mortgagee) for principal, interest and costs of suit by the sum of Rs. B.

4. (Insert declarations as to liability of the defendants) and it is decreed as follows :—

5. (Insert paragraphs 4 and 5 as in Form No. 53 down to and including the words " payment out to him of the said sums " and continue) so paid into Court.

6. In default of payment in by the 1st and 2nd defendants as aforesaid, the property or a sufficient part thereof shall be sold and the

net sale-proceeds shall be paid into Court and applied in payment to Madras Forms.
 the plaintiff of the said sums of Rs. , Rs. and Rs.
 (insert the sums due to the 1st defendant for principal, interest and costs
 and to the plaintiff for costs), and such further interest and costs as
 may be allowed by the Court and the balance, if any, shall be paid to
 the 2nd defendant.

7. In default of payment by the 1st defendant as aforesaid the
 plaintiff shall be at liberty to apply for a decree against him for the said
 sum of Rs. B and further interest thereon, and, if the net sale-proceeds
 in the preceding paragraph shall not be sufficient to pay to the plaintiff
 the several sums therein mentioned, for a decree against the 1st and
 2nd defendants for the amount of such deficiency.

And the further consideration, etc.

FORM NO. 55.

Rule 377. *Decree in a suit by a second mortgagee against the first
 mortgagee and the mortgagor, when the first mortgagee consents to a sale
 free from his mortgage.*

(Formal parts as in Form No. 51.)

And C. D., the first defendant (the 1st mortgagee) by his vakil consent-
 ing that, if the 2nd defendant (the mortgagor) shall make default in
 payment into Court as hereinafter mentioned, the mortgaged prop-
 erty shall be sold free from his mortgage, dated the day of

, on condition that he shall have the same interest in the sale-
 proceeds as in the mortgaged property (insert declarations as to the
 amounts due to the plaintiff and the 1st defendant respectively, for
 principal, interest and costs; and as to the liability of the mort-
 gagor, and the priorities of the mortgagees as in Form No. 51).

And it is decreed as follows :—

1. The said 2nd defendant shall be at liberty on or before the
 day of to pay into Court the said sums (insert the amounts
 due to the plaintiff and 1st defendant for principal, interest and costs).

2. On payment as aforesaid, the plaintiff and the 1st defendant
 shall each bring into Court all documents in his possession or power
 relating to the mortgaged property in the plaint mentioned, and also an
 acknowledgment signed by him of the receipt of the amount due to
 him, and that all claims and interest to and in the mortgaged property
 of himself, and of all persons claiming under him and under whom he
 claims have been extinguished; and thereupon they shall be at liberty
 to apply for payment out of the amounts due to them respectively.

3. In default of payment as in aforesaid, the said premises or a
 sufficient part thereof, shall be sold, and the net sale-proceeds shall be

Madras Forms. paid into Court and applied, first, in payment of the amount due to the 1st defendant, together with such further interest and costs as may be allowed by the Court; secondly, in payment to the plaintiff of the amount due to him, together with such further interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the 2nd defendant.

And the further consideration of this suit is adjourned to.

FORM NO. 56.

Rule 379. *Interim decree for an account in a redemption suit.*

Claim for an account of the amount due on a mortgage, dated the day of and made between and to redeem the property comprised therein.

(Where an account is claimed against a mortgagee in possession, insert account claimed, for example—for an account of the rents and profits of the said property received by the defendant, or which without wilful default might have been so received, and to redeem, etc.)

This suit coming on this day, etc.

And it appearing that the defendant has been in possession of the mortgaged property since the day of and has made certain improvements therein: It is ordered that the following accounts be taken, that is to say:—

1. An account of what is due to the defendant for principal and interest under the said mortgage.

2. An account of the rents and profits of the mortgaged property in the plaint mentioned received by the defendant, or by any other person by his order or for his use, or which without the wilful default of the defendant might have been so received.

3. An account of all sums paid by the defendant for kist and other public charges in respect of the said property.

4. An account of all sums paid by the defendant for the due management of the property, and the collection of the rents and profits thereof.

5. An account of all sums properly laid out by the defendant in necessary repairs and lasting improvements on the said property.

6. An account of the sums paid by the defendant for premiums on the policy of insurance, dated day of and interest thereon at the rate of Rs. per cent. per annum.

7. An account of all sums properly paid by the defendant, in connection with suit No. on the file of the Court of for the support of the plaintiff's title to the said property.

8. An account of the deterioration in value of the mortgaged Madras Forms. property since the day of caused by the wilful neglect of the defendant in not repairing the same. (*Or state shortly any other act of waste*).

9. (*Where tender has been duly made to mortgage in possession, limit the ordinary accounts to date of tender, and add*):—An account of the gross amount of rents and profits of the said property received since the day of (date of tender) by the defendant or by any other person by his order or for his use, or which without wilful default might have been so received.

10. (*Where annual rests are ordered, add*):—And in taking the said accounts, annual rests shall be made of the clear balance, and interest computed on such respective balances at Rs. per cent. per annum and in making such annual rests, except the first, the interest on each preceding balance shall be included in the balance then stated, so as to charge the defendant with compound interest thereon. But if the amount spent in any year by the defendant in respect of the matters mentioned in paragraphs 3, 4, 5, 6 and 7 exceed the net balance of rents and profits received by him, after deducting the interest due under the said mortgage, then interest shall be allowed to him at the rate aforesaid on such excess.

11. And it is ordered that the defendant do, on or before the day of , file in court, and deliver to the plaintiff a copy of his account of the matters above mentioned, and that the plaintiffs do, on or before the day of , file in court and deliver to the defendant a copy of his objections, if any, to such account and of any items of surcharge (or, and it is ordered that the defendant do, on or before the day of , file in court his account of the matters above mentioned, and that the plaintiff shall be at liberty to inspect the same, and do, on or before the day of , file in court a statement of his objections, if any, to such account and of any items of surcharge, and that the defendants shall be at liberty to inspect such statement).

And it is decreed as follows:—

12. The plaintiff shall be at liberty, within months from the date on which the court shall declare the amount (if any) due under the said mortgage, to pay the said amount and the costs of this suit into court, and thereupon the defendant shall bring into court all documents in his possession or power relating to the mortgaged property together with an acknowledgment in writing signed by him of the receipt of the said sums, and that all claims and interest to and

Madras Forms. in the mortgaged property of himself and of all persons claiming under him and under whom he claims, have been extinguished.

(a) In the event of payment in as aforesaid, the said sums shall be delivered to the defendant, who shall, at the request of the plaintiffs, concur in duly registering the said acknowledgment in the office of the registrar of assurances of, (if the mortgagee is in possession and the defendant shall deliver to the plaintiff possession of the mortgaged property).

(b) If the plaintiff shall make default in payment as aforesaid then the defendant may apply for the sale of the mortgaged property, and the same or a sufficient part thereof shall be sold accordingly.

13. But, if it shall appear on taking the said accounts, that there is nothing due to the defendant, then the defendant shall deliver to the plaintiff the documents and the acknowledgment above mentioned, and possession of the mortgaged property, and shall pay to the plaintiff any sum which shall be found due from the defendant in excess of the amount due to him.

And the further consideration of this suit is adjourned to the day of

FORM No. 57.

Rule 382. *Decree in suit for sale.*

(CAUSE-TITLE.)

(*Formal parts as in Form No. 52.*)

It is declared that there is now due on the said mortgage the sum of Rs. (x) for principal and the sum of Rs. (y) for interest, and that, on the day of , there will be due the further sum of Rs. (z) for interest at the said rate, making in all the sum of Rs. (x + y + z). And it is further declared that the defendant is personally liable for the said amount. And it is ordered as follows :—

1. The defendant shall be at liberty on or before the said day of , to pay into court the said sum of Rs. (x + y + z) and the further sum of Rs. for the costs of this suit.

2. On payment as aforesaid the plaintiff shall bring into court (continue as in paragraph 2 of Form 52).

3. In default of payment in as aforesaid, the said premises, or a sufficient part thereof, shall be sold, and the net sale-proceeds shall be paid into court and applied in payment of the said sums, together with such subsequent interests and costs as may be allowed by the court, and the balance, if any, shall be paid to the defendant

FORM No. 58.

Rule 388. *Declarations to be inserted where the defendants or some Madras Forms. of them are not personally liable for the mortgage-monies.*

1. *Where defendants are legal representatives of a deceased mortgagor—*

And it is further declared that *A. B.* and *C. D.*, the defendants herein, are liable for the said amount to the extent only of the property of *E. F.* deceased, come to their hands as his legal representatives.

2. *Where defendants are Hindu father and sons—*

And it is further declared that *A. B.*, the 1st defendant is personally liable for the said amount, and that *C. D.* and *E. F.*, the 2nd and 3rd defendants, are liable only to the extent of the ancestral property belonging to them and the said *A. B.*

3. *Where the defendants are the manager and members of an undivided Hindu family.*

And it is further declared that *A. B.*, the 1st defendant is personally liable for the said amount, and that *C. D.* and *E. F.*, the 2nd and 3rd defendants, are liable only to the extent of the property of the undivided Hindu family consisting of them and the said *A. B.*

4. *Where under the mortgage the mortgagor is not personally liable—*

And it is further declared that, under the terms of the said mortgage, *C. D.*, the defendant, is not personally liable for the repayment of the said amount.

5. *Where the personal remedy is barred by limitation—*

And it is further declared that the remedy of the plaintiff against *C. D.*, the defendant, personally is barred by limitation and that he is entitled only to repayment out of the mortgaged property.

FORM No. 59.

Rule 383. *Order upon payment by the defendant.*

(CAUSE-TITLE.)

Upon reading the application of the plaintiff presented on the day of and upon hearing Mr. , Vakil for the plaintiff, and the defendant (not appearing by pleader, or in person, though served with notice of this application) (or this suit coming on this day for further consideration in the presence of, etc.). And it appearing that on the day of the defendant paid into court the sum of Rs. ($X + Y + Z$) in pursuance of the decree herein, dated the day of and that on the day of

Madras Forms. the plaintiff brought into court the documents of title relating to the mortgaged property in his possession or power and the acknowledgment in writing in the said decree mentioned. It is ordered and decreed as follows :—

(1) That the sum of Rs. (X + Y + Z) be paid out of court to the plaintiff.

(2) That the said documents and acknowledgment shall be delivered to the defendant, and that the plaintiff do, when so requested, concur in duly registering the same in the office of the registrar of assurances of

(3) (*When the mortgagee is in possession*). That the plaintiff do forthwith deliver to the defendant possession of the mortgaged property in the schedule hereto described.

(4) That satisfaction be entered up for the full amount of the said decree.

SCHEDULE.

(*When mortgagee is in possession, insert description of property as in the plaint.*)

FORM No. 60.

Rule 383. *Order for sale if defendant has made default in payment.*

(CAUSE-TITLE.)

This suit coming on this day on further consideration in the presence of Mr. , Vakil for the plaintiff, and the defendant (not appearing by pleader or in person), and it appearing that the defendant has made default in payment of the amount mentioned in the decree herein, dated the day of . It is ordered that the mortgaged property (*or the portion of the mortgaged property specified in the schedule hereto*) be sold, and that the plaintiff do, on or before the day of , bring into court the affidavits and certificate prescribed by rule 205 of the Original Side Rules, 1902, and a sum sufficient for the expenses of the sale.

And the further hearing of this suit is adjourned to the day of 19 .

FORM No. 61.

Rule 386. *Order confirming sale.*

• • • (CAUSE-TITLE.)

This suit coming on this day on further consideration in the presence of, etc. Upon reading the report of sale directed by the order

herein, dated the day of , and it appearing that there is Madras Forms, now in court to the credit of this suit the sum of Rs. , it is ordered as follows :—

1. That the sale of the several lots specified in the schedule hereto, to the respective persons and at the respective prices in the third and fourth columns of the same schedule mentioned, be confirmed, and that the certificates of sale be issued to the said persons accordingly.

2. That copies of the said several certificates be sent to the Registrar of assurances of .

3. That the further sum of Rs. (XX), being interest at the rate of Rs. per cent. per annum on the principal amount of the decree herein, dated the day of , from the date thereof to this day, and the sum of Rs. (YY), for costs subsequent to the said decree, be allowed to the plaintiff.

4. That the sum of Rs. (X + Y + Z) the amount of principal, interest and costs, due under the said decree, and the said sums of Rs. (XX), and Rs. (YY), making in all the sum of Rs. , be paid out of court to the plaintiff, and that satisfaction in full of the said decree be entered up.

5. That the sum of Rs. , being the balance of the said sum of Rs. now in court, be paid to the defendant.

SCHEDULE.

Number of lot,	Description of the Property,	Name of Purchaser.	Sale Price.

FORM No. 62.

Rule 386. Order confirming sale, when the sale-proceeds are not sufficient to satisfy the decree.

(CAUSE-TITLE.) .

This suit coming on this day on further consideration in the presence of, etc., and it appearing that there is now in court to the credit of this suit the sum of Rs. , which is not sufficient to discharge

Madras Forms. the amount due to the plaintiff in full, and the plaintiff by his vakil applying for a decree against the defendant, personally, for the deficiency. It is ordered as follows :—

1. }
2. } Insert paragraphs 1, 2 and 3 of Form No. 61.
3. }

4. That the sum of Rs. be paid out of court to *A. B.*, the plaintiff, and that satisfaction of the said decree be entered up for the said sum.

5. That *C. D.*, the defendant herein, do pay to *A. B.*, the plaintiff, the sum of Rs. (being the balance of the aggregate amount of principal, interest and costs due under the said decree, and further interests and costs hereby decreed), together with interest thereon at the rate of Rs. per cent. per annum from this day until realization.

6. (Or, if any defendant be not personally liable.) That *C. D.*, and *E. F.*, the defendants herein, do out of the property and credits of *E. F.*, deceased, come to their hands as his representatives, pay (continue as in paragraph 5).

Or, that *C. D.*, the 1st defendant, do personally, and the said *C. D.*, and *E. F.* and *G. H.*, the 2nd and 3rd defendants, do out of the property of the undivided family, whereof they are members, in their possession, pay (continue as in paragraph 5 above).

(Or, in the case of a mortgage by a Hindu father) :—That *C. D.* the 1st defendant, do personally, and the said *C. D.*, and *E. F.*, and *G. H.*, the 2nd and 3rd defendants, do out of the ancestral property belonging to them, pay (continue as in paragraph 5).

SCHEDULE.

(As in Form No. 61.)

FORM No. 63.

Rule 388. Decree in a redemption-suit by the mortgagor against a single mortgagee.

(CAUSE-TITLE.)

(Formal parts as in Form No. 56.)

The suit coming on this day, etc. It is declared that the plaintiff is entitled to redeem the said mortgage, and that the amount due to *C. D.*, the defendant (the mortgagee), on the day of (date fixed for redemption) is Rs. (*X*) for principal and Rs. (*Y*) for interest at the rate of Rs. (contract rate) per cent. per annum,

making in all the sum of Rs. ($X + Y$), and the sum of Rs. (Z) for his Madras Forms. costs of this suit.

And it is decreed as follows :—

1. The plaintiff shall be at liberty, on or before the said day of , to pay into court the said sums of Rs. ($X + Y$) and Rs. (Z) and thereupon the defendant shall bring into court all documents in his possession or power relating to the mortgaged property together with an acknowledgment in writing signed by him of the receipt of the said sums, and that all claims and interest to and in the mortgaged property of himself and of all persons claiming under him and under whom he claims, have been extinguished.

2. In the event of payment in as aforesaid, the said sums shall be delivered to the defendant, who shall, at the request of the plaintiff, concur in duly registering the said acknowledgment in the office of the registrar of assurances of (if the mortgagee is in possession, and the defendant shall deliver to the plaintiff possession of the mortgaged property).

3. If the plaintiff shall make default in payment as aforesaid, then the defendant may apply for the sale of the mortgaged property, and the same or a sufficient part thereof shall be sold accordingly.

And the further consideration of the suit is adjourned into chambers to be heard on the day of .

FORM No. 64.

Rule 389. *Redemption-suit—Order upon accounts and objections.*

(CAUSE-TITLE.)

This suit coming on this day on consideration of the account directed by the decree herein, dated the day of

It is decreed as follows :—

1. The amount due to the defendant under the mortgage in the plaint mentioned is Rs. for principal, and Rs. for interest to the day of ; and on the day of (date fixed for redemption), there will be due the further sum of Rs. for interest at the rate of per cent. per annum ; making in all the sum of Rs. .

2. The balance of the rents and profits of the said property chargeable to the defendant, together with interest at the said rate to the said day of (date fixed for redemption), is Rs. .

3. The amount due to the plaintiff in respect of deterioration caused to the mortgaged property by the defendant is Rs. and Rs. interest thereon at the rate of per cent. per annum from

Madras Forms. the day of to the said day of (the
date fixed for redemption), making in all the sum of Rs.

4. The amount due to the defendant on the said day
of , after setting off the said sums chargeable against him,
is Rs. together with Rs. the costs of this suit, and the
said day is hereby limited for payment by the plaintiff to the defendant
of the said amounts and costs.

And the further consideration of this suit is adjourned to the day
of .

FORM No. 65.

Rule 390. *Decree in a redemption-suit by the mortgagor who has made tender of the mortgage amount.*

Claim for an account of the amount on the day of
(date of tender), due on a mortgage, dated the day of
and made between (parties); (for a declaration) that the amount then
due was duly tendered to the defendant by the plaintiff; to redeem the
property comprised in the said mortgage; and for costs of suit.

This suit coming on this day, etc.

It is declared that on the day of the plaintiff duly
tendered to the defendant the sum of Rs. (X), being the amount
then due to him for principal and interest under the said mortgage,
and that the defendant is not entitled to any further interest, and
that the plaintiff is entitled to the sum of Rs. (A) for his costs of
this suit.

And it is decreed as follows:—

1. That the plaintiff shall be at liberty on or before the
day of to pay into court the sum of Rs. (Y), being the balance
due under the said mortgage after deducting the said sum of Rs. (A)
and thereupon (continue as in Form No. 63, paragraphs 1, 2 and 3).

FORM No. 66.

Rule 391. *Order extending time for redemption.*

(CAUSE-TITLE.)

This suit coming on this day on further consideration in the pre-
sence of, etc., and the vakil for the plaintiff applying that the time by
the decree herein, dated the day of fixed for payment
of the mortgage-monies be postponed to the day of .

It is ordered that the plaintiff do pay to the defendant the sum of
Rs. for his costs of this hearing, and that, upon the plaintiff
paying to the defendant before the day of the said
sum of Rs. the sum of Rs. being the costs by the said

decree directed to be paid and the sum of Rs. for further in- Madras Forms.
 terest on the principal sum at the rate Rs. per cent. per annum
 from this day to the day of making in all the sum of
 Rs. , the time for redeeming the mortgaged property be ex-
 tended to the said day of (the extended date), and
 that the further hearing of this suit be adjourned to the day of
 . But in default of payment of the said sum of Rs.
 by the time aforesaid, then it is ordered that this application be re-
 fused and that the further hearing of this suit be adjourned to the
 day of .

FORM No. 67.

Rule 392. *Redemption suit—Order for sale on default of payment upon the application of the mortgagee.*

(CAUSE-TITLE.)

This suit coming on this day, etc., and it appearing that
 the plaintiff has made default in payment of the amount mentioned
 in the decree herein, dated the day of , and the de-
 fendant by his Vakil applying for sale of the mortgaged property. It
 is ordered that the mortgaged property (or the portion of the mortgaged
 property specified in the schedule hereto) be sold, and that the defend-
 ant do, on or before the day of , bring into court the
 proclamations for sale, the affidavit and certificate prescribed by rule
 205, and a sum sufficient for the expenses of the sale.

And the further hearing, etc.

FORM No. 68.

Rule 393. *Decree in a foreclosure-suit.*

(CAUSE-TITLE.)

Claim under a mortgage of immovable property, dated the
 day of , for Rs. , principal, and Rs. , in-
 terest thereon, the day of , and further interest at
 Rs. per cent. per annum ; for foreclosure or sale in default of
 payment, and for costs.

This suit coming on this day for final disposal in the presence of,
 etc. It is declared that there is now due on the said mortgage the sum
 of Rs. (X) for principal, and the sum of Rs. (Y) for interest, and that
 on the day of there will be due the further sum of
 Rs. (Z), for interest at the said rate, making in all the further sum of
 Rs. (X + Y + Z). And it is ordered as follows :—

Madras Forms.

1. The defendant shall be at liberty on or before the said day of to pay into court the said sum of Rs. (X + Y + Z), and the sum of Rs. (a) for the costs of this suit.

2. On payment as aforesaid the plaintiff shall bring into court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and shall reconvey to the defendant the said property free and clear of and from all incumbrances due by him, or any person claiming under him (*if the plaintiff derives his claim from the original mortgagee, add, or by those under whom he claims*) (*if the plaintiff is in possession, add, and shall deliver to the defendant possession of the said property*).

3. In default of payment as aforesaid, by the time aforesaid, the defendant shall from thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the said mortgaged property.

And the further consideration of this suit is adjourned into chambers to be heard on the day of .

FORM No. 69.

Rule 394. Suit for foreclosure—Several mortgagees—Decree giving one period to redeem.

(CAUSE-TITLE.)

(Insert declarations as to the amounts due to the several mortgagees for principal and interest on the day fixed for redemption, and their several priorities).

And it is ordered as follows :—

1. That, upon the defendants, or any of them, paying to the plaintiff on or before the day of the said sum of Rs. for his costs of his suit, the plaintiff do bring into court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and do reconvey the said mortgaged property free and clear of all incumbrances made by him, or by any person claiming under him (or under whom he claims), to the defendants or such of them as shall redeem the mortgaged property, as he or they shall direct, such conveyance to be settled by the registrar in case the parties differ.

2. In default of defendants or any of them paying to the plaintiff the said sums by the time aforesaid (*insert names of the defendants*), the 1st, 2nd, 3rd, etc., defendants shall thenceforth stand absolutely debarred and foreclosed of and from all interest in, and all right to redeem, the mortgaged property.

And the further consideration, etc.

FORM No. 70.

Rule 394. *Suit for foreclosure—Decree in suit by first mortgagee against a 2nd mortgagee and the mortgagor—Successive periods for redemption.* Madras Forms.

(CAUSE-TITLE.)

Claim under a mortgage of immovable property, dated the _____ day of _____, for Rs. _____ principal, and Rs. _____ interest thereon to the _____ day of _____ and further interest at Rs. _____ per cent. per annum, for foreclosure or sale in default of payment and for costs.

This suit coming on this day for final disposal in the presence of etc.

It is declared that the several accounts due on the _____ day of _____ are, to the plaintiff Rs. _____ for principal and Rs. _____ for interest, making in all the sums of Rs. (X); and to C. D. the 1st defendant (*the second mortgagee*) Rs. _____ for principal and Rs. _____ for interest, making in all the sum of Rs. _____; and it is further declared that there is due to the plaintiff the sum of Rs. _____ and to the 1st defendant the sum of Rs. _____ for their respective costs of this suit; and it is further declared that the 2nd defendant (*the mortgagor*) is personally liable for the aforesaid amounts; and it is further declared that the plaintiff is entitled to payment of the amount due to him in priority of the 1st defendant (*or if there are several subsequent mortgagees that the several parties hereto are entitled to payment of sums due to them respectively in the following order—first, the plaintiff, secondly, the 1st defendant, thirdly, the 2nd defendant, etc.*)

And it is decreed as follows:—

1. C. D., the first defendant (*the second mortgagee*) shall be at liberty on or before the _____ day of _____ to pay into court the sum of Rs. (X) _____, (*the amount found to be due to the plaintiff for principal and interest to the said date*) and the sum of Rs. (A) _____ for his costs of this suit.

2. On payment as aforesaid the plaintiff shall bring into court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and shall reconvey to the 1st defendant the said property clear of and from all incumbrances due by him, or any person claiming under him (*if the plaintiff derives his claim from the original mortgagee, add, or by those under whom he claims*) (*if the plaintiff is in possession, add, and shall deliver to the 1st defendant possession of the said property*).

Madras Forms.

3. In default of payment as aforesaid by the time aforesaid the 1st defendant shall from thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property.

4. And, in case of such foreclosure, *E. F.*, the 2nd defendant (*the mortgagor*), shall be at liberty on or before the day of to pay into court the said sum of Rs. (*X*) , and the sum of Rs. (*Z*) being further interest on the principal sum of Rs. , to the said day, making together the sum of Rs. (*X + Z*) and the sum of Rs. the costs of the plaintiff.

5. On payment by the second defendant as aforesaid the plaintiff shall bring into court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and shall reconvey to the 2nd defendant the said property free and clear of, and from all incumbrances due by him, or any person claiming under him (*if the plaintiff derives his claim from the original mortgagee, add, or by those under whom he claims*) (*if the plaintiff is in possession, add,* and shall deliver to the 2nd defendant possession of the said property).

6. In default of payment as aforesaid, by the time aforesaid the 2nd defendant shall from thenceforth stand absolutely debarred and foreclosed of, and from all right to redeem the said mortgaged property.

7. But, in case *C. D.*, the 1st defendant, shall redeem the said mortgaged property, then *E. F.*, the 2nd defendant, shall be at liberty on or before the day of to pay into court the said sums of Rs. (*X*) and Rs. (*A*), the said sum of Rs. (*Y*) (*the amount declared to be due to the 2nd mortgagee, for principal and interest*), making in all the sum of Rs. (*X + A + Y*) and also the sum of Rs. (*B*) being interest on the said aggregate amount at the rate of Rs. per cent. per annum from the said day of (*the date to which interest was calculated on the principal amounts due to the plaintiff and the 2nd mortgagee*), to the said day of (*the date fixed for redemption by the mortgagor*) and also the sum of Rs. (*C*) for the costs of the 1st defendant of this suit.

8. On payment as aforesaid by the 2nd defendant the 1st defendant shall bring into court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and shall reconvey to the 2nd defendant the said property free and clear of and from all incumbrances due by him, or any person claiming under him (*if the 1st defendant derives his claim from the original mortgagee, add, or by those under whom he claims*) (*if the 1st defendant is in possession, add,* and shall deliver to the 2nd defendant possession of the said property).

9. In default of payment as aforesaid, by the time aforesaid the 2nd defendant shall from thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the said mortgaged property. And the further consideration, etc.

FORM No. 71.

RULE 395.—*Decree absolute for foreclosure.*

(CAUSE-TITLE.)

This suit coming on this day on further consideration in the presence of, etc., and it appearing that the defendant has not paid into court the sum of Rs. $(X + Y + Z)$ in the decree herein, dated the day of mentioned, and that the whole thereof still remains due. It is decreed as follows :—

1. That *C. D.*, the defendant, and all persons claiming through or under him do from henceforth stand absolutely debarred and foreclosed of all right to redeem the mortgaged property in the schedule hereto set forth : (*if the defendant is in possession*), and do forthwith deliver to *A. B.*, the plaintiff, possession of the said property.

2. That *C. D.*, the defendant, do pay to *A. B.*, the plaintiff, the sum of Rs. (*a*), the costs in the said decree mentioned, and also the sum of Rs. (*b*), for his costs subsequent thereto, making in all sums of Rs. (*a + b*), together with interest thereon at the rate of Rs. per cent. per annum from this day until realization.

SCHEDULE.

(*Set out description of the mortgaged property as in the plaint.*)

FORM No. 72.

RULE 395.—*Final decree in a foreclosure-suit or suit for redemption upon payment by the defendant.*

(CAUSE-TITLE.)

This suit coming on this day on further consideration in the presence of, etc., and it appearing that on the day of the defendant paid into court the sum of Rs. $(X + Y + Z)$, and the sum of Rs. (*a*), for the costs of this suit, in the decree herein, dated the day of mentioned, and that the plaintiff on the day of executed a deed of reconveyance of the mortgaged property in the plaint mentioned in favour of the defendant, and has brought into court all documents in his possession or power relating to the said property.

Madras Forms. It is ordered as follows :—

1. That the said sums of Rs. ($X + Y + Z$), and Rs. (a) be paid out of court to the plaintiff.

2. That the said deed and documents be delivered out of court to the defendant, and the plaintiff do, when so requested, concur in registering the said deed in the office of the registrar of assurances of the district of ; (*if the plaintiff is in possession, add, and do forthwith deliver possession of the said property, in the schedule hereto set forth, to the defendant*).

3. That *C. D.*, the defendant, do pay to *A. B.*, the plaintiff, the sum of Rs. . for his costs of the said reconveyance and of this suit subsequent to the said *interim* decree, with interest thereon at the rate of Rs. per cent. per annum from this day until realization.

SCHEDULE.

(*If the mortgagee is in possession, insert description of the mortgaged property as in the plaint.*)

FORM No. 73.

RULE 396.—*Suit for foreclosure—Order for sale on application of the defendant.*

(CAUSE-TITLE AND CLAIM.)

This suit coming on this day for final disposal in the presence of, etc., and the Vakil for the defendant applying that the mortgaged property may be sold, and it appearing to this court that a sale of the said property is for the benefit of all parties to this suit. It is declared that there is now due on the said mortgage the sum of Rs. (X), for the principal, and the sum of Rs. (Y) for interest, and that on the day of there will be due the further sum of Rs. (Z) for interest at the said rate, making in all the sum of Rs. ($X + Y + Z$); and it is further declared that the defendant is personally liable for the said amount.

And it is ordered as follows :—

1. That the defendant do, on or before the day of pay into court the sum of Rs. , being the amount of interest now due on the principal sum secured by the said mortgage; the sum of Rs. for the expenses of the sale of the said property and the costs of the plaintiff in respect thereof; and also the sum of Rs. for the costs of the plaintiff of this suit.

2. That, on payment as aforesaid, the said property be sold, Madras Form
and that the plaintiff do have the conduct of the said sale, and do,
on or before the day of , bring into court the procla-
mation, affidavits, and certificate, etc., prescribed by Order XVIII.

3. That the net proceeds of the said sale be applied in payment
to the plaintiff of the said sum of Rs. (*the principal sum declared
to be due to the plaintiff*), and subsequent interest thereon at the
rate aforesaid, and the subsequent costs of the plaintiff of this suit so
far as the same will extend.

4. If the said sale-proceeds shall not be sufficient to pay the said
sum, and costs in full, the plaintiff shall be at liberty to apply for a
decree for the balance.

5. If the defendant shall make default in payment of the sums
in the first paragraph hereof mentioned, then he shall be at liberty,
on or before the day of , to pay into court the said sum
of Rs. ($X + Y + Z$), and the sum of Rs. (a) for the costs of this suit.

6. On payment as aforesaid the plaintiff shall bring into court
all documents in his possession or power relating to the mortgaged
property in the plaint mentioned, and shall reconvey to the defendant
the said property free and clear of and from all incumbrances due by
him or any person claiming under him (*if the plaintiff derives his
claim from the original mortgagee, add, or by those under whom he
claims*) (*if the plaintiff is in possession, add, and shall deliver to the
defendant possession of the said property*).

7. In default of payment as aforesaid, by the time aforesaid,
the defendant shall from thenceforth stand absolutely debarred and
foreclosed of and from all right to redeem the said mortgaged property.

And the further consideration, etc.

FORM No. 74.

RULE 397.—*English Mortgage or Mortgagee by Conditional Sale.
Interim decree in a suit for redemption.*

(CAUSE-TITLE AND CLAIM.)

The suit coming on this day, etc.

1. (Insert declaration of the amount due as in Form No. 63).

And it is decreed as follows :—

2. The plaintiff shall be at liberty on or before the day
of to pay into court the said sums of Rs. , and Rs. , and
thereupon the defendant shall bring into court all documents in his
possession or power relating to the mortgaged property, and shall
reconvey the said property to the plaintiff free from the said mortgage,

Madras Forms. and from all incumbrances created by the defendant or any person claiming under him, or under whom he claims (*if the mortgagee is in possession*) and shall put the plaintiff into possession of the said property.

3. In the event of payment in as aforesaid and upon the defendant's complying with the provisions of the last preceding paragraph, the said sums shall be paid out of court to the defendant, who shall, at the request of the plaintiff, concur in duly registering the said reconveyance in the office of the register of assurances of

4. If the plaintiff makes default in payment as aforesaid, the defendant shall be at liberty to apply that the plaintiff may be foreclosed (*where the mortgage is not by conditional sale*) or that the property, or a sufficient part thereof may be sold.

And the further consideration of this suit is adjourned to the day of

FORM No. 75.

RULE 404.—*Notice of payment into Court.*

(CAUSE-TITLE.)

In the matter of a mortgage, dated the day of
and in the matter of the Transfer of Property Act, 1882.

To C. D. of (*residence and description*).

Take notice that on the day of A. B. of (address and description), under the circumstances set forth in his affidavit filed in this matter on the day of , paid into court to the credit of the above matter, to the account of C. D. of, etc., the sum of Rs. , consisting of the several items specified in the schedule hereto, in accordance with the provisions of sec. 83 (or 102) of the said Act; and that you are named in the said affidavit as the person entitled to the said monies, as the mortgagee under the said mortgage-deed (*or as the case may be*).

And also take notice that, upon bringing into court the said mortgage-deed and all documents in your possession or power relating to the property comprised therein, and upon executing and registering a proper reconveyance of the said property (or acknowledgment of discharge of the said mortgage) (and delivering up possession of the said property to the said A. B.), you are at liberty to apply, by original petition, and upon notice, to the said A. B., for payment out to you of the said monies.

The address for service of the said A. B. is

Madras Forms.

6. I am the same person as C. D. named in the said mortgage (or, if not the original mortgagee show how the applicant derives his title to the mortgage-money) and am solely and absolutely entitled to all monies due thereunder.

7. I am willing to accept the said sum of Rs. deposited in court in full discharge of all moneys due under the said mortgage and my costs of this application and the reconveyance of the mortgaged property.

8. I have brought into court the said mortgage-deed and the documents specified in the schedule hereto, which are all the documents in my possession or power relating to the mortgaged property (if any documents delivered to the mortgagee are not brought into court, the same should be accounted for).

9. On the day of I delivered possession of the mortgaged property to the said A. B.

10. Your petitioner therefore prays—

(a) That an order may be made for payment out of court to him of the said sums of Rs. .

(b) For such other relief as to this court may seem fit.

11. I declare that the facts above stated are true to my knowledge except as to matters stated to be on information and belief and as to those matters I believe them to be true.

(Sd.) C. D.

(Sd.) ,

Pleader of the petitioner.

FORM No. 77.

RULE 406.—*Notice of Petition by Mortgagee for payment out of Court.*

(CAUSE-TITLE.)

To A. B. of (address and description).

Take notice that on the day of C. D. of, etc., presented a petition to the above court for payment out to him of the sum of Rs. , on the day of deposited by you in court to the credit of the above matter to the account of the said C. D. and that the day of is appointed for the hearing of the said application, and that if you do not attend on the same day in person or by pleader, an order may be passed in your absence.

And also take notice that the address for service of the said C. D.
is

(Sd.) E. F.,
Plender of the said C. D.

BOMBAY RULES.

Of the rules relating to the civil jurisdiction of the Original Side Bombay rules.
in the High Court of Bombay, Chapter XXXI, contains the rules made
under this Act. (Published in the Bombay Gazette, 18th September,
1891.)

582. Every application under sec. 83 shall be made by a verified petition, stating the facts.

583. Unless otherwise ordered, there shall be paid into court, in addition to the sum deposited under sec. 83, or any subsequent section, a sum sufficient to provide for the fees and charges of the court, and for the mortgagee's costs of obtaining payment out of court; and also when such payment is made under sec. 83, a further sum to provide for the mortgagee's costs of transferring the property, and causing such transfer to be registered; such costs to be estimated and certified by the taxing officer.

584. Every order for payment of money into court, under sec. 83, shall specify the sums to be paid, and the purpose for which each sum is intended.

585. Unless otherwise ordered, the applicant or his attorney shall serve, or cause to be served, the notice to be given under sec. 83.

586. When money is paid into court under sec. 86, or under any subsequent section, the person making such payment shall forthwith give written notice thereof to the person or persons on whose account such payment is made.

587. Every application by a mortgagee to obtain payment of money out of court shall be by a verified petition.

588. Unless otherwise ordered, whenever any notice or order is served under the Act or under these rules, an affidavit in proof of such service shall be filed as soon as possible thereafter.

589. Where it shall appear that previous to any payment into court under sec. 83, or any subsequent section, a sufficient tender was made to and refused by the mortgagee, he shall not be allowed to obtain payment of the amount deposited in court to meet his claim, without deduction of the fees and charges of the court, nor shall be allowed his costs of obtaining such payment. Except as aforesaid or when otherwise ordered the mortgagee shall be allowed all costs properly incurred by him.

Bombay rules. 590. If through default on the part of the plaintiff it becomes necessary to obtain an enlargement of time under sec. 87, no interest shall be allowed for the enlarged time.

591. On an application for payment of money out of court under sec. 83, or any subsequent section, by a mortgagee, who has complied with the orders of the court and the provisions of the Act and of these rules, so far as they relate to him, or apply to his case, and has, when required so to do, transferred the property and possession, free from incumbrance, and caused such transfer to be registered, and accounted for the documents of title which were held by him, the court shall make such order or orders as to it shall seem fit for the disposal of the capital sum and interest thereon, and of the fund for costs and expenses.

592. Every decree absolute for foreclosure under sec. 87 or sec. 93 shall direct that possession of the property be given to the mortgagee except where he is already in possession. It shall be drawn up with a recital of the decree and the proceedings had thereunder and with a full description of the property.

593. Where immovable property is sold under sec. 88, or any subsequent section, the purchaser may, on application to a judge in chambers, obtain a certificate of sale as evidence of the title to the property sold to him and may also, at his own costs, obtain a conveyance from the mortgagor.

594. Every enforceable order made under sec. 83 may be enforced under the provisions of the Code of Civil Procedure, and shall for that purpose be deemed to have been made in a suit instituted under that Code.

595. Rules relating to sale by the commissioner for taking accounts so far as they are applicable shall apply to all sales by the court under secs. 88 and 89 or 92 and 93.

596. In this chapter the Act means "the Transfer of Property Act, 1882" and the sections referred to are the sections of that Act.

Appellate Side.

The Honourable the Chief Justice and Judges of His Majesty's High Court of Judicature at Bombay are pleased to make, under sec. 104 of the Transfer of Property Act IV of 1882, the following rules for the guidance of the Civil Courts, subordinate to the High Court, and to direct that they be read after Circular No. 110 at page 62 of the High Court Civil Circular Order Book.

(Published in the Bombay Gazette, July 8th, 1904.)

1. In these rules, unless there is something repugnant in the **Bombay rules** subject or context, "Mortgagor" includes every person entitled under a decree or otherwise to redeem the mortgaged property; and "mortgagee" includes every person entitled under a decree or otherwise to the rights of the mortgagee.

2. A mortgagor making a deposit or a payment into court under Chapter IV of the Act shall file a verified petition stating the facts of the case.

3. Unless otherwise ordered, the mortgagor shall, in addition to the amount due, deposit or pay into court a sum sufficient to provide for—

(a) the mortgagee's costs of obtaining payment out of court;

(b) the mortgagee's costs, when the payment is made under sec. 83 of the Act, of executing or registering (1) a reconveyance in the case of an English mortgagee, or (2) an acknowledgment of the discharge of the mortgagee in other cases;

(c) such other costs, if any, as may be awarded to the mortgagee under sec. 94 of the Act; and

(d) the interest to which the mortgagee may be entitled under the 2nd paragraph of sec. 84 of the Act.

4. The court by endorsement of the mortgagor's petition may order the deposit or payment to be received by the Nazir. Such order shall specify the several sums to be deposited or paid and the purpose for which each sum is intended.

5. The mortgagor's petitions shall be entered in the register of miscellaneous application requiring judicial enquiry unless it is made in the course of the execution of a decree for foreclosure or sale obtained by the mortgagee, in which case it shall form a part of such execution-proceeding. If the mortgagor has obtained a decree for redemption, the petition shall be made in the form prescribed by sec. 235 of the Civil Procedure Code and entered in the register of applications for execution.

6. Unless the mortgagee has already put in his appearance, the court shall issue a notice of the deposit or payment to the mortgagee requiring him to deposit in court on a day to be fixed by it all documents in his possession or power relating to the mortgaged property, and also the mortgage-deed when such payment is made under sec. 83 of the Act.

7. Subject to the provisions of sec. 102 of the Act, the notice shall be served and its service shall be proved in the manner prescribed by the Code of Civil Procedure, and Civil Circular Orders.

Bombay rules.

8. Every application by a mortgagee to obtain payment of money out of court shall be made by a verified petition accompanied by such of the documents mentioned in Rule VI, as have not been deposited in court and, when necessary, by a draft deed of reconveyance of the mortgaged property and acknowledgment of discharge of the mortgage as the case may be.

9. On the day fixed for hearing, or on any other subsequent day to which the hearing may be adjourned, the court shall decide all the questions arising between the mortgagor and mortgagee and pass appropriate orders in accordance with the provisions of the Act and of these rules so far as they relate or apply to the case.

10. Where it shall appear that previous to any deposit or payment into court, a sufficient tender was made to and refused by the mortgagee, he shall not be allowed his cost of obtaining payment of the amount so deposited or paid. Except as aforesaid, or when otherwise ordered, the mortgagee shall be allowed all costs properly incurred by him.

11. If through default on the part of the mortgagee it becomes necessary to obtain an enlargement of time under sec. 87 or sec. 93 of the Act, no interest shall be allowed for the enlarged time without a special order in that behalf.

12. Every decree absolute for foreclosure under sec. 87 of sec. 93 of the Act shall direct that possession of the property be given to the mortgagee except when he is already in possession. It shall be drawn up with a recital of the decree and the proceedings had thereunder and with a full description of the property.

13. A mortgagee applying for payment of money deposited under sec. 83 of the Act, shall be required, if necessary, to deliver up possession of the mortgaged property to the mortgagor.

14. Every enforceable order under sec. 83 may be enforced under the provisions of the Code of Civil Procedure and shall for that purpose be deemed to have been made in a suit instituted under that Code.

15. Every application by a mortgagee for an order absolute for foreclosure or sale shall be made in the form prescribed by sec. 235 of the Civil Procedure Code, the last column of the form containing a prayer for the order and for any other relief to which the applicant may be entitled.

16. The decree for sale shall reserve to the plaintiff liberty to apply for a further decree under sec. 90 of the Act when the same is applicable.

17. When the court passes an order absolute for foreclosure or sale, the order shall be noted across the heading " Execution " in the Register of Suits.

18. No order absolute for foreclosure or sale shall be passed except on notice to the opposite party unless the court otherwise directs.

19. (a) Secs. 286—294 and 304—319 and 328—335 of the Code of Civil Procedure shall apply to proceedings under Chapter IV of the Act.

(b) Sec. 258 of the same Code applies to payment of mortgage-debts.

20. If leave to bid is granted to the mortgagee a reserve price as regards him shall be fixed of not less than the amount then due for principal, interest and costs in case the property is sold in one lot and not less in respect of each lot (in case the property is sold in lots) than such sum as shall appear to be properly attributable to it in relation to the amount aforesaid.

21. The provisions hereinbefore contained as to a mortgagor and mortgagee shall, so far as may be, respectively apply to the owner of immovable property subject to a charge (as defined in sec. 100 of the Act) and the person having such charge.

Bombay, 22nd July, 1904.

CHAPTER V.

OF LEASES OF IMMOVABLE PROPERTY.

105. A lease of immovable property is a transfer Lease defined. of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent. Lessor, lessee, premium and rent defined.

Duration of certain leases in absence of written contract or local usage.

106. In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor to lessee, by six months' notice expiring with the end of a year of the tenancy ; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

Leases how made.

[¹] **107.** A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

[²] All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession :

Provided that the Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official Gazette, direct that leases of immovable property, other than leases from year to year or for any term exceeding one year, or reserving a yearly rent, or any class of such

¹ As to limitation to the territorial operation of s. 107, see *s. 1, supra*. Section 107 extends to every cantonment in British India—see Act XIII of 1889, s. 32(I).

² This paragraph and proviso were

substituted by the Amending Act VI of 1904 for the original paragraph which was as follows: All other leases of immovable property may be made either by an instrument or by oral agreement.

leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

Rights and liabilities of lessor and lessee.

A.—Rights and Liabilities of the Lessor.

- (a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover :
- (b) the lessor is bound on the lessee's request to put him in possession of the property :
- (c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

B.—Rights and Liabilities of the Lessee.

- (d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease :

- (e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

- (f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :
- (g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor.
- (h) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth : provided he leaves the property in the state in which he received it :
- (i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :

- (j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

Nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee :

- (k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :
- (l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf :
- (m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within

three months after such notice has been given or left :

- (n) if the lessee becomes aware of any proceeding to recover the property or any part thereof or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence notice thereof to the lessor :
- (o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own ; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto ;
- (p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes :
- (q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

Rights of
lessor's trans-
feree.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities, of the lessor as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by

the lease, unless the lessee elects to treat the transferee as person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportions of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

110. Where the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Exclusion of day on which term commences. Where no day of commencement is named, the time so limited begins from the making of the lease.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences. Duration of lease for a year.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option. Option to determine lease.

111. A lease of immovable property determines— Determination of lease.

(a) by efflux of the time limited thereby :

(b) where such time is limited conditionally on the happening of some event—by the happening of such event : . . .

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the

same extends only to, the happening of any event—by the happening of such event :

- (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right :
- (e) by express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them :
- (f) by implied surrender :
- (g) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease :
- (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

Waiver of
forfeiture.

112. A forfeiture under section 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

113. A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting. Waiver of notice to quit.

Illustrations.

(a) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires. *B* tenders, and *A* accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires, and *B* remains in possession. *A* gives to *B* as lessee a second notice to quit. The first notice is waived.

114. Where a lease of immovable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred. Relief against forfeiture for non-payment of rent.

115. The surrender, express or implied, of a lease of immovable property does not prejudice an underlease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and Effect of surrender and forfeiture on under-leases.

the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

Effect of
holding over.

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

Illustrations.

(a) *A* lets a house to *B* for five years. *B* underlets the house to *C* at a monthly rent of Rs. 100. The five years expire, but *C* continues in possession of the house and pays the rent to *A*. *C*'s lease is renewed from month to month.

(b) *A* lets a farm to *B* for the life of *C*. *C* dies, but *B* continues in possession with *A*'s assent. *B*'s lease is renewed from year to year.

Exemption of
leases for
agricultural
purposes.

117. None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the local Government, with the previous sanction of the Governor-General in Council, may by notification published in the local official Gazette declare all or any of such provisions to be so applicable, 'in the case of all or any of such leases, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

¹ These words were inserted by the Amending Act VI of 1904.

CHAPTER VI.

OF EXCHANGES.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."
"Exchange" defined.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him.
Right of party deprived of thing received in exchange.

120. Save as otherwise provided in this chapter each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.
Rights and liabilities of parties.

121. On an exchange of money, each party there- by warrants the genuineness of the money given by him.
Exchange of money.

CHAPTER VII.

OF GIFTS.

122. "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.
"Gift" defined.

Acceptance
when to be
made.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

Transfer how
effected.

[a] 123. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Gift of exist-
ing and future
property.

124. A gift comprising both existing and future property is void as to the latter.

Gift to several,
of whom one
does not ac-
cept.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

When gift may
be suspended
or revoked.

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

[a] As to limitation of the territorial operation of s. 123, see s. 1, *supra*. Section 123 extends to every cantonment in British India—see Act XIII of 1889, s. 32 (1).

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a) *A* gives a field to *B*, reserving to himself, with *B*'s assent, the right to take back the field in case *B* and his descendants die before *A*. *B* dies without descendants in *A*'s lifetime. *A* may take back the field.

(b) *A* gives a lakh of rupees to *B*, reserving to himself, with *B*'s assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000 which continue to belong to *A*.

127. Where a gift is in the form of a single transfer of several things to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Onerous gift to disqualified person.

Illustrations.

(a) *A* has shares in *X*, a prosperous joint stock company, and also shares in *Y*, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in *Y*. *A* gives *B* all his shares in joint stock companies. *B* refuses to accept the shares in *Y*. He cannot take the shares in *X*.

(b) *A* having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to *B* the lease, and also, as a separate and independent transaction, a sum of money. *B* refuses to accept the lease. He does not by this refusal forfeit the money.

128. Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee

Universal donee.

is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

*Saving of
donations
mortis causa
and Muham-
madan law.*

129. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by section 123, any rule of Hindu or Buddhist law.

CHAPTER VIII.*

OF TRANSFERS OF ACTIONABLE CLAIMS.

*Transfer of
actionable
claim.*

130. (1) The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not :

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings, for the same in his own name

* This chapter was substituted for the original chapter VIII by Act II of 1900.

without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance.

Illustrations.

(i) *A* owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who, not having received notice of the transfer, as prescribed in section 131, pays *B*. The payment is valid, and *C* cannot sue *A* for the debt.

(ii) *A* effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If *A* dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of *A*'s executor, subject to the proviso in sub-section (1) of section 130 and to the provisions of section 132.

For definition of actionable claim, see section 3, pp. 637, 643, 644, *ante*. It does not include a debt secured by a mortgage but many of the rules regulating the assignment of a mortgage-debt have been incorporated in this chapter and govern transfers of actionable claims. See p. 330, *ante*. The repealed section 131 ran as follows:—

“131. No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of a transfer, with the debt or property, shall be valid as against such transfer.”

Transfer of an actionable claim.—A mortgage of debts due to the mortgagor made in the ordinary form, with proviso for redemption and re-assignment, of which express notice is given to the debtor is an absolute assignment under the English law. *Tancred v. Delagoa Bay, &c. Co.* (1889), 23 Q. B. D., 239; *Durham v. Robertson* (1898), 1 Q. B., 765; see however *Mercantile Bank v. Evans* (1899), 2 Q. B., 613; see also *Hughes v. Pump House Hotel Co.* (1902), 2 K. B., 190. As to whether an assignment of a part of an entire debt is within the provisions of sub-section 6 of section 25 of the Judicature Act, 1873, see *Durham v. Robertson* (*supra*), per Chitty, L. J.; *Jones v. Humphreys* (1902), 1 K. B., 10; cf. *Hughes v. Pump House, &c.* (1902), 2 K. B., 190; *Skipper v. Holloway* (1910), 2 K. B., 630, per Darling, J. (subsequently reversed on

Definition.

What amounts to transfer.

another ground, *ibid*, p. 635, n.) It has been held under the Transfer of Property Act that when a creditor purports to create a lien or charge on the debt due to him in favour of another person, the word 'lien' or 'charge' has no meaning except as giving the latter a right to recover the debt from the debtor and the transaction is substantially a transfer of an actionable claim. *Ardeshir v. Sirdar* (1908), 33 Bom., 610; 10 Bom. L. R., 1146.

Notice of transfer not essential for title.

Where a creditor hypothecates a debt due to him and authorises the person to whom the debt is hypothecated to recover the debt from the debtor, the debt is transferred to the transferee. Notice of the transfer is not necessary to perfect the title of the assignee. When the debtor received notice of the transfer both from the transferor and transferee but the notice from the transferor directed payment to the transferee under certain conditions, it was held that the debtor was not justified in refusing to recognise the assignment and paying the amount to the transferor. *Gopala Krishna v. Gopala* (1909), 33 Mad., 123. See section 134, *post*.

Execution of instrument essential.

Shall be effected only, &c.—The provision making the execution of an instrument essential in order to effect a transfer of an actionable claim is new. Section 25, sub-section 6, of the Judicature Act of 1873 does not abolish the previously recognised modes of assignment of choses in action but only creates a new form of assignment which shall be deemed effectual in law as well as in equity. In England if the assignment, for want of notice or otherwise, does not come within the provisions of the above sub-section, it may be enforceable as an equitable assignment. The positive language, however, of this section precludes the application in India of the principles of English law. *Mulraj v. Vishwanath* (1912), 40 I. A., 24; 37 Bom., 198; 17 C. W. N., 209. An assignee of a negotiable promissory note cannot sue on it unless the assignment is in writing as required by this section. *Arunachala v. Subba* (1907), 17 M. L. J., 393; but see *Venkatadri v. Lakshminarasimha* (1910), 21 M. L. J., 80.

In *Brandt's, &c., Co. v. Dunlop, etc.* (1905), A. C., 454, a letter was addressed by the creditor requesting his debtor to undertake to pay the debt "for account of" the creditor. It was held that the language used is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over to a third person. See also *Re Briggs & Co.* (1906), 2 K. B., 209; *Alexander v. Steinkhardt* (1903), 2 K. B., 208.

A direction in writing to pay the amount due on an instrument endorsed on such instrument by the payee thereof, coupled with the delivery of the instrument so endorsed to the person to whom payment

is directed, is an assignment within the meaning of this section. *Rama v. Venkatachellam* (1906), 30 Mad., 75. The provision requiring an instrument in writing in order to effect a transfer of an actionable claim covers transfers by way of security as well as absolute transfers. *Mulraj v. Vishwanath*, supra; overruling. *Vishwanath v. Mulraj* (1911), 13 Bom. L. R., 590.

As to questions regarding the invalidity of assignment of debts as savouring of maintenance or being otherwise against public policy; see *Comfort v. Betts* (1891), 1 Q. B., 737; *Fitzroy v. Cave* (1905), 2 K. B., 364.

Has received express notice, &c.—The Act does not prescribe the mode in which such notice should be served, sections 102 and 103 being confined to notices under Chapter IV. Under the amended Chapter VIII it is expressly provided that the validity of the transfer in no way depends upon the giving of notice to the debtor, although notice is necessary to prevent the debtor from dealing with the debt to the prejudice of the assignee. *Vishwanath v. Mulraj* (1911), 13 Bom. L. R., 590, overruled on another point; see also *Gopala Krishna v. Gopala* (1909), 33 Mad., 123; cf. *Ismail v. Jadu* (1911), 13 C. L. J., 641, a case decided under the old law. An assignee who does not give notice to the debtor therefore runs a very serious risk, for any payment made by the debtor without notice of the assignment will be a good payment as against the transferee. So also where a mortgagor makes a payment to the mortgagee without having notice of an assignment or of a sub-mortgage. See cases cited in the notes at pp. 329, 330, ante. The notice must be in the form prescribed under section 131. It should also be noted that in the English law, notice is not necessary in order to make the assignment binding as against the assignor of the debt; whether such assignment is voluntary or for value. *Gorringe v. Irwell, &c., Works* (1886), 34 Ch. D., 128; *Ward v. Duncombe* (1893), A. C., 369, 392; *Donaldson v. Donaldson* (1854), Kay., 711; *In re Patrick* (1891), 1 Ch., 82; *Newman v. Newman* (1885), 28 Ch. D., 674, 678; *Re Griffin* (1899), 1 Ch., 408. The reason given is that notice is only necessary for the protection of the assignee and not to perfect his title to the subject-matter of the assignment. And the same view was taken of the provisions of the repealed section 131. *Jugdeo v. Brij Behari* (1886), 12 Cal., 505; *Kalka v. Chandan* (1887), 10 All., 20; *Subbammal v. Venkataram* (1887), 10 Mad., 289; *Ragho v. Narayan* (1895), 21 Bom., 60. In the last mentioned case, it is said that the assignee may sue the debtor without any previous notice, as it is sufficient if the latter becomes aware of the assignment for the first time 'on being served with a writ in a suit by the assignee.' But see *Ismail v. Jadu* (1911), 13 C. L. J., 641.

And every dealing with the debt, &c.—Transferees acquire no priority under the Act by giving notice to the debtor but take in order of the dates of their transfers. *Visvanath v. Mulraj* (1911), 13 Bom. L. R., 590 ; overruled on another point. But in England not only is notice necessary in order to prevent the debtor from paying the original creditor, or the trustee from paying the *cestui que trust*, but also in order to prevent a subsequent assignee from acquiring priority. See *Marchant v. Morton, &c.* (1901), 2 K. B., 829. "Whether the fund be a trust-fund held by *A* in trust for *B*, or a debt payable by *A* to *B*, if *B* assigns and his assign requires *A* to pay the money over to him, that gives him priority over a previous assign of *B*, who has not given such notice." *Per* Wood, V. C., in *Lee v. Howlett* (1856), 2 K. & J., 531, 535. The case of a mortgage-debt charged on land is, however, treated as an exception in the English law to the rule that an incumbrancer who gives notice to the trustees has a better title in equity than an incumbrancer of earlier date who has not given such notice. See pp. 383-386, *ante* ; see also *Jones v. Jones* (1857), 8 Sim., 633. For the most recent case, see *Taylor v. London and County Banking Co.* (1901), 2 Ch., 231. But where there is a trust for sale the rule will apply, although the land has not yet been sold, and the securities all purport to deal with land and not with money. *Lloyd's Bank v. Pearson* (1901), 1 Ch., 865 ; (1901), W. N., 59. Cf. *Re Hughes Trusts* (1864), 2 H. & M., 89. But this rule holds good only where the competition is between transferees for value without notice. *Spencer v. Clarke* (1878), 9 Ch. D., 137 ; *In re Holmes* (1885), 29 Ch. D., 786. Where the assignees are mere volunteers, notice is immaterial. It is also immaterial where the equities of the parties are not in other respects equal. Thus, an assignee for value will be entitled to preference even without notice over a voluntary assignee, or a judgment-creditor as the latter can only take what the judgment-debtor could honestly give. *Bradeley v. Consolidated Bank* (1888), 34 Ch. D., 536, and cases cited therein. And a trustee in bankruptcy stands in no better position. *In re Russell's Policy Trust* (1872), 15 Eq., 26, decided under the former law of reputed ownership. Notice to one trustee is in general sufficient to prevent a subsequent assignee from obtaining priority and the death of such trustee cannot take away from a person any priority already acquired during his life. *Ward v. Duncombe* (1893), A. C., 369. But though an incumbrancer of a trust-fund who first gives notice to any of the trustees obtains priority over a prior incumbrancer who has given no notice to any of them, notice to one does not affect the other trustees so as to make them liable for what they may do in ignorance of the notice to their co-trustees. *Low v. Bouverie* (1891), 3 Ch., 82. In this connection

Priority by giving notice.

Notice in the case of co-trustees.

it may be added, that the knowledge which an assignor trustee has of his own incumbrance is not sufficient to give the assignee priority against a subsequent incumbrancer who gives due notice to all the trustees. *Lloyd's Bank v. Pearson* (1901), 1 Ch., 865; (1901) W. N., 59. Again, although formal notice to the trustee of an incumbrance does not give priority over an earlier incumbrance of which the trustee may have obtained accidental notice, the converse proposition that incumbrances are to rank not in the order of notices given by the incumbrancers but of accidental knowledge obtained by the trustees, does not hold good. *Arden v. Arden* (1885), 29 Ch. D., 702. The trustees to whom notice should be given are those who have 'legal dominion over the fund;' per Lord Macnaghten in *Ward v. Duncombe* (1893), A. C., 384;—which means those whose duty it is to pay over the fund to the assignor. *Halt v. Dewell* (1845), 4 Hare, 446; *Stephens v. Green* (1895), 2 Ch., 148. "But it is enough for priority to complete the equitable assignment of a debt if notice is given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable, or is merely charged with the duty of making the payment. Nor is it material whether the right to receive the money, and the consequent obligation to pay it, is, at the time when the notice is given, absolute or conditional, so long as the person who receives the notice is himself bound by some contract or obligation, existing at the time when the notice reaches him, to receive and pay over, or to pay over if he has previously received, the fund out of which the debt is to be satisfied." Per Lord Selborne, C., in *Addison v. Cox* (1872), L. R., 8 Ch., 79. As to where a person may be regarded as claiming through or under another by whom notice has been given so as to entitle the former to claim the benefit of such notice; see *M'Carthy v. Kingston* (1843), Dr. 439. Notice, however, will not avail the assignee, if the fund has been paid into court and thus ceased to be under the control of the trustees. *Puniock v. Bailey* (1883), 23 Ch. D., 497. And notice to a person before the fund comes under his control will be equally ineffectual, as you cannot go to a stranger and say, "If you at any time hereafter should receive any money for A B take notice that I have a charge on it." *Webster v. Webster* (1862), 31 Beav., 393; *Buller v. Plunkett* (1860), 1 John & H., 441; *Somerset v. Cox* (1865), 33 Beav., 634.

Notice should be given to those who have the legal dominion over the fund.

The rules relating to notice in the English law may be thus summed up:—

Notice is not necessary to perfect the assignment between assignor and assignee; though it is necessary to preserve priority against a subsequent assignee.

Where the fund is in the hands of trustees for the assignor, notice must be given to the trustees or one of them. But where it is in court in an action for execution of trusts in which the assignor is interested, a stop order instead of notice to the trustees is required to give priority. If, however, notice has been given to the trustees before the fund was paid into court, the assignee does not lose priority by not obtaining a stop order. 2 W. & T., L. C., p. 40. See also Davidson's Precedents, Vol. II, Pt. II, pp. 779, *et seq.*

It may be here observed that though the law does sometimes take notice of fractions of a day, as a rule, where notices are given on the same day the elder is preferred to the younger security. *Johnstone v. Cox* (1881), 16 Ch. D., 571; 19 Ch. D., 17.

Notice to be
in writing
signed.

131. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

Signed by the transferor, &c.—Cf. section 25 (6) of the Judicature Act, 1873, which does not provide by whom the notice is to be given; and see the remarks of Farran, C. J., in *Ragho v. Narayan* (1895), 21 Bom., 60. In England, notice may be given after the death of the assignor. *Walker v. Bradford Old Bank* (1884), 12 Q. B. D., 511. The notice must be definite. *Re The Hamburg and Brazilian Rly. Co.*, Bitt Pr. Cas., cxxx. Mere misdescription will not vitiate the notice. *Woodburn v. Grant* (1856), 22 Beav., 483; *Whittingstall v. King* (1882), 46 L. T., 520. But it seems that if the notice is wrongly dated, it will be treated as invalid. *Stanley v. English Fibres, &c.* (1899), 68 L. J., Q. B., 839. Where a notice given by the transferor did not contain the address of the transferee, such notice was held not sufficient under section 131. *Hunsraj v. Nathoo* (1907), 9 Bom. L. R., 838.

Name and
address of
transferee to
be given.

The debtor or other person cannot question the validity of an assignment to which they are strangers. *Walker v. Bradford Old Bank* (1884), 12 Q. B. D., 511. Cf. *Rajendra v. Watson & Co.* (1891), 18 Cal., 510. See in this connection, two articles on 'Assignment of Choses in Action' in 16 L. Q. R., 241, and 17 L. Q. R., 90. There may however be cases in which the transferee of the debt, though he may have as between himself and his transferor a perfectly valid transfer of the debt, nevertheless cannot sue the debtor for it; as for instance, if the transfer was itself a fraud. *Dokhina v. Dino Nath* (1878), 3 C. L. R., 9. Notice to a debtor who has given a negotiable instrument in pay-

ment of his debt that the debt has been assigned can be disregarded by the debtor, even if the creditor is still the holder of the negotiable instrument. *Bence v. Shearman* (1898), 2 Ch., 582; and see section 137, *post*.

132. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Liability of transferee of actionable claim.

Illustrations.

(i) *A* transfers to *C* a debt due to him by *B*, *A* being then indebted to *B*. *C* sues *B* for the debt due by *B* to *A*, in such suit *B* is entitled to set off the debt due by *A* to him, although *C* was unaware of it at the date of such transfer.

(ii) *A* executed a bond in favour of *B* under circumstances entitling the former to have it delivered up and cancelled. *B* assigns the bond to *C* for value and without notice of such circumstances. *C* cannot enforce the bond against *A*.

The repealed section was as follows :—

137. The person to whom a debt or charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer.

Subject to all the liabilities, &c.—This only formulates the well-known rule that the assignee of a chose in action stands in exactly the same situation as the assignor as to the equities arising upon it; which means that the assignee is, generally speaking, not only bound by the state of the accounts between the assignor and the debtor but also by any condition to which the debt was subject in the hands of the assignor. It has however been held in some cases that this rule only means that the transferee takes subject to the account but not to any equity of the mortgagor to impeach the mortgage for fraud. *Judd v. Green* (1876), 33 L. T., 597; 45 L. J. Ch., 108; *Nant-y-glo, &c. v. Tamplin* (1876), 35 L. T., 125. The Roman law on the subject is thus stated in Colquhoun, § 1757. “The cessionary must submit to all pleas and exceptions termed *reales* when founded on and connected with the right ceded but not to pleas termed *personales* not so founded on or connected with the right in question where the debtor might have opposed such to the cedent himself.” See the ~~pages~~ cases cited in the notes at pp. 330, 331, *ante*; cf. *Matthews v. Wallwyn* (1798), 4 Ves., 118; *Mangles v. Dixon* (1852), 3 H. L. C., 702; *Roxburghe v. Cox* (1880), 17 Ch. D., 520; *Gossit v. Davis* (1900), 82 L. T., 43; *Young v. Kitchen* (1878),

Assignee stands in the same situation as assignor.

3 Ex. D., 127 ; *Government of Newfoundland v. Newfoundland Ry. Co.* (1888), 13 App. Cas., 199 ; *Re Moss Bay Hematite, &c., Co.* (1892), 8 Times R., 475 ; *Christie v. Taunton, &c., Co.* (1893), 2 Ch., 175 ; *Re Jones* (1897), 2 Ch., 203, 204 ; *Biggerstaff v. Rowall's Wharf* (1896), 2 Ch., 101 ; *Ord v. White* (1840), 3 Beav., 357 ; *Walker v. Jones* (1866), L. R., 1 P. C., 50, 61 ; *Tooth v. Hallett* (1869), L. R., 4 Ch., 242 ; *disting. Drew v. Josolyne* (1887), 18 Q. B. D., 590. See also Lewin, p. 781 ; *Ryall v. Rowles*, 1 White & Tudor, L. C., p. 102. It seems to make no difference that the interest claimed by the assignee was created by the very person who asserts the equity, if the latter has not been guilty of any misconduct. *Cockell v. Taylor* (1858), 15 Beav., 103, 119. And the assignee of a mortgage-debt, though he may get the legal estate, does not stand upon any higher footing ; for he too takes subject to all equities affecting the debt in the hands of the mortgagor at the time of the notice. It follows that if a mortgage is transferred without the privity of the mortgagor the latter has the same rights against the assignee as he has against the mortgagee, and " whatever he can claim in the way of set-off, or mutual credit, as against the mortgagee, he can claim equally against the assignee." *Norrish v. Marshall* (1821), 5 Madd., 475 ; *disting. Bradwell v. Catchpole* (1818), 3 Swan., 78 n. It may be here noticed that a debt may be successively assigned over any number of times, each successive assignee taking the same title as the immediately preceding assignee, so that the ultimate assignee is bound by all the equities that have arisen while the subject of the assignment was being transmitted from one person to another. *Ord v. White* (1840), 3 Beav., 357. Thus, where the mortgagor's agent, who has received the amount to pay off the mortgage, becomes himself the transferee of the mortgage, and then transfers it to a third person, the latter cannot treat the debt as a subsisting charge upon the property. *Turner v. Smith* (1901), 1 Ch., 213.

Case of
successive
assignments.

When debtor will be estopped.—It is the duty of the assignee to make inquiries, and as a general rule, the creator of the security thus assigned is not bound, on receiving a simple notice of the assignment, to volunteer information. If, therefore, any loss arises, it falls upon him whose duty it is to make the inquiries and who has not made them. But if the notice given by the assignee discloses on the face of it, that which induces the belief that he has been deceived in accepting the assignment, the creator of the security is bound to inform the assignee of the real circumstances, and if he should not do so, he cannot be allowed to take advantage of the equities existing as between the assignor and himself. The conduct of the mortgagor in such cases is treated as amounting either to an estoppel or a ratification of a transaction originally impeachable, and in either

case he would be precluded from setting up any equity which he may have possessed against the mortgagee as against the assignee, *Halett's case* (1862), 31 L. J. Ch., 293; *In re South Essex Estuary Co.* (1870), 11 Eq., 157; *Mangles v. Dixon* (1852), 3 H. L., 702; cf. *In re Hercules Insurance Co.* (1874), 19 Eq., 302. Again, a mortgagor will not be at liberty to dispute the truth of any admission in the mortgage-deed as regards the amount of money advanced to him, unless perhaps there were any circumstances to arouse the suspicion of the assignee. For circumstances under which an assignee of a security may be held to be put upon inquiry by the terms of the security itself as to matter of equitable fraud affecting its validity, see *Tahor v. Cunningham* (1876), 24 W. R., 153. It is true in not making any inquiry of the mortgagor, the assignee takes the risk of any payment having been made after the date of the mortgage, but he cannot be charged with negligence, if he relies upon the solemn assurance of the mortgagor as to the real bargain carried into effect by the mortgage-deed. See pp. 330, 331, *ante*; cf. *West v. Jones* (1851), 1 Sim., 205; distinguish *Parker v. Clarke* (1861), 30 Beav., 54; where the mortgage-deed was treated as void.

Negotiable instruments are excepted from the operation of this chapter by section 137. In England debentures to bearer are now regarded as negotiable instruments. See *Bechuanaland Exploration Co. v. London Trading Bank, Ltd.* (1898), 2 Q. B., 658; see also the notes to section 137, *post*. There is however nothing to prevent a debtor from contracting with his creditor that he will not avail himself against a transferee of any rights which he may possess against the creditor or any assignee of his. And where a contract is ambulatory, the court will presume that the parties intended that an assignee should take free from equities. *In re Agra and Masterman's Bank* (1867), L. R., 2 Ch., 391; *In re Blackely Ordnance Co.* (1867), L. R., 3 Ch., 154; *In re General Estates Company* (1868), L. R., 3 Ch., 758; *In re Gay & Co.* (1900), 2 Ch., 149, 154. See also *In re Bomford, &c., Co.* (1883), 24 Ch. D., 85; where the result of the authorities is summed up by Kay, J.; cf. *Higgs v. Assam Tea Company* (1867), L. R., 4 Ex., 387, where subsequent dealings with the assignees were also relied upon. See also *Webb v. Herne Bay* (1870), L. R., 5 Q. B., 642; *In re Natal Investment Company* (1868), L. R., 3 Ch., 355.

Assignment
free from
equities.

What debts may be set off.—Set-off may be claimed even when the amount is due under a transaction independent of and unconnected with the claim assigned. *Arunachellam v. Sulpramanian* (1906), 30 Mad., 235. The date of the transfer should be read as meaning the date when the transfer becomes operative; for it is settled law that the debtor is entitled to set off against the assignee all debts accruing

due from the assignor to him before he has notice of the assignment ; and it does not matter whether they are both due and payable before, or due before but not payable till after notice of the assignment. *Wilson v. Gabriel* (1863), 4 B. & S., 243 ; *In re China Steamship Co.* (1868), 7 Eq., 240 ; *Roxburghe v. Cox* (1880), 17 Ch. D., 520 ; *Christie v. Taunton & Co.* (1893), 2 Ch., 175. Cf. *Vasudeva v. Damodaran* (1899), 23 Mad., 86. But the debtor cannot set off a debt which does not accrue till after notice of the assignment, although the liability out of which it arises existed before notice. *Unity Banking Association v. King* (1858), 25 Beav., 72 ; *Watson v. Midwalls Ry. Co.* (1867), L. R., 2 C. P., 593 ; *Price v. Bannister* (1878), 3 Q. B. D., 569 ; *In re Milan Tramways Co.* (1884), 22 Ch. D., 122 ; 25 Ch. D., 587 ; *Christie v. Taunton & Co.* (1893), 2 Ch., 175, 184. As to the rights of executors to set off debts due from a legatee to the estate as against a mortgagee of the legacy, see *Wills v. Greenhill* (No. 1) (1860), 29 Beav., 376 ; cf. *Re Moore* (1881), 45 L. T., 466 ; *In re Knapman* (1881), 18 Ch. D., 300 ; *Re Langham* (1896), 74 L. T., 611.

Warranty of
solvency of
debtor.

133. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Mortgaged
debt.

134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery : secondly, in or towards satisfaction of the amount for the time being secured by the transfer ; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Where a debt is transferred, &c.—Cf. definition of a mortgage in section 58 (a). The holder of a charge on a debt due to his debtor is a transferee of an actionable claim and is entitled to recover the debt from the transferor's debtor. Where the original creditor is added as a party, the charge-holder, though not entitled to the whole amount, may recover the whole. *Ramasami v. Muthu* (1910),

34 Mad., 53. Where the benefit of the mortgage-debt is transferred, but the mortgaged property is retained by the transferor, he is a trustee for the transferee of whatever he recovers from the mortgagor by virtue of his possession of the property. *Morley v. Morley* (1858), 25 Beav., 253, 258. The sub-mortgagee can realise his security only when the original mortgagee makes default. On the other hand, he can exercise this right without reference to the default of the original mortgagor, and when exercised the benefit of the original security subject to the original mortgagor's right to redeem it will be transferred.

Liability of assignee.—An equitable assignee of a debt is not subject to the same rules as the holder of a bill of exchange, but is only bound to use ordinary diligence. *Glyn v. Hood* (1859), 1 DeG. F. J., 334. Disting. *Exp. Mure* (1788), 2 Cox., 63. Nevertheless in taking an assignment of a debt by way of mortgage the mortgagee should take the precaution of introducing a clause in the mortgage-deed, providing that it shall not be obligatory on the mortgagee to sue for the debt, unless and until he shall think proper, as otherwise he might be charged with the resulting loss in case he is guilty of default. The mortgagee is bound to use reasonable diligence to recover the assigned debt from the debtor. *Shyam v. Rameswar* (1904), 31 I. A., 176 ; 32 Cal., 27. See p. 569, *ante*. It may also be desirable in some cases to give the mortgagee a power to accept any composition or security for the payment. Enquiry should be made from the mortgagor before completion of the transaction as to the state of the accounts and notice of the sub-mortgage should be given to him on completion.

135. Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

Assignment of rights under marine or fire policy of insurance.

136. No Judge, legal practitioner, or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance or at the instance of any person

Incapacity of officers connected with Courts of Justice.

claiming by or through him, any actionable claim so dealt with by him as aforesaid.

Saving of
Negotiable
Instruments
etc.

137. Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation.—The expression ‘mercantile document of title to goods’ includes a bill of lading, dock-warrant, warehouse-keeper’s certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

The repealed section 139 was as follows : Nothing in this chapter applies to negotiable instruments.

Quasi-negoti-
able instru-
ments not
within the
section.

Negotiable instruments.—This term would seem to include only promissory notes, bills of exchange and cheques. See Act XXVI of 1881. It should, however, be noticed that the two qualities which were thought at one time to be the distinctive features of such instruments, viz., that a transferee takes free from equities and can also sue in his own name are no longer their peculiar attributes ; for stocks, shares, scrips, debentures, bills of lading, dock-warrants and many other mercantile documents of a similar character will also pass to a holder in due course untrammelled by equities. It is true the old law merchant knew nothing of them. But their negotiability could not be wholly ignored ; hence the phrase, which belongs to Lord Bowen, of negotiability by estoppel or estoppel by ostensible ownership or agency. See *Easton v. London Joint Stock Bk.* (1886), 34 Ch. D., 113 ; *Goodwin v. Roberts* (1876), 1 App. Cas., 490 ; *London Joint Stock Bank v. Simmons* (1892), A. C., 213 ; *Rumball v. Metropolitan Bank* (1877), 2 Q. B. D., 194. Hence, too, the phrase quasi-negotiable instruments by which these documents are generally known.

But it has now been decided in England that the list of negotiable instruments did not close with promissory-notes, bills of exchange,

exchequer bills, bank notes, cheques, East India bonds (as to which see 51 Geo. III) and dividend warrants. *Bentinck v. London Joint Stock Bank* (1893), 2 Ch., 120; *Bechuanaland Exploration Co. v. London Trading Bank, Ltd.* (1898), 2 Q. B., 658. Cf. *Venables v. Baring Brothers & Co.* (1892), 3 Ch., 527. It is curious to notice that though English judges would not recognise the negotiability of instruments made in England, whether created by individuals or companies, a more liberal rule was applied to foreign instruments governed by foreign law. Cf. *Cox v. Coleridge* (1822), 3 B. & C., 45; *Goodwin v. Roberts* (1875), L. R., 10 Ex., 76, 337; 1 App. Cas., 476; *Lang v. Smyth* (1831), 7 Bing., 293; *Smith v. Wegnellin* (1869), 8 Eq., 198; *Crouch v. Credit Foncier* (1873), L. R., 8 Q. B., 384; *Picker v. London* (1887), 18 Q. B. D. 515; *Venables v. Baring* (1892), 3 Ch., 539. And even the presence of a seal will not be fatal to the claim of an instrument to be treated as negotiable. But unless there is something on the face of a bond to show that it is to be used as a negotiable instrument a transferee will take subject to equities. Mere intention is not enough. *Graham v. Johnson* (1869), 8 Eq., 36. See the doubts expressed by Bowen, L. J., in *Easton v. London Joint Stock Bk.* (1886), 34 Ch. D., 113. The term 'negotiable' is thus a term of somewhat uncertain meaning, and in the opinion of a learned Canadian lawyer may well be discarded in favour of ambulatory. See for instance *Simmons v. London Joint Stock Bk.* (1891), 1 Ch., 294; (1892), A. C., 213, in which the learned judges of the Court of Appeal could not agree as to the meaning of the word 'negotiable.' The remarks of the same writer on codification in England and Canada would also seem to be not unworthy of the attention of the Indian legislature.

What instruments are held negotiable.

"It is a most curious fact, and one which well illustrates the frequently baneful effect of codification, that while the law is (as we have just been observing) rapidly expanding upon the lines above indicated, so that we are now fairly well able to say that choses in action pass to a transferee free from equities where that was the intention of the parties (the wit of man has at length come that far), certain promises to pay money to order or bearer, on the other hand, by reason of certain recent decisions in England and Canada bid fair to become an exception to the rule.

Effect of codification.

"A promissory-note is by the codes closely defined. This is within the prescribed limits, and this is not. Any addition to the given form takes the document out of the category of notes. And if it is not a note, then it is thought that all its equities must assuredly accompany it upon transfer. The result then is that a document which is very nearly a promissory-note or bill of exchange carries its equities with it, even if it be one intended to be redeemable to third persons

because of the codes ; while documents having no relation to bills or notes (and very much less like them), but which are also intended to be ambulatory, do not. The fault of the decisions is that they are still using the old classification of 'negotiable' and 'non-negotiable' instruments." Ewart on Estoppel, p. 420.

The objections to the repealed section have now been removed and all mercantile documents are now transferable free from all equities.

Discharge of person against whom claim is sold.

The repealed section 135 would apply to an assignment made previous to the repeal. See *Ismail v. Jadu* (1911), 13 C. L. J., 641. It was as follows :—

135. Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

Nothing in the former part of this section applies—

- (a) where the sale is made to the co-heir to, or co-proprietor of, the claim sold ;
- (b) where it is made to a creditor in payment of what is due to him ;
- (c) where it is made to the possessor of a property subject to the actionable claim ;
- (d) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment.

Purchase of several claims for a gross sum.

Paying to the buyer the price and the incidental expenses, &c.—Where two actionable claims are assigned together for a certain sum the assignee may recover the difference between what he paid for both and what he actually recovered in respect of one of them, and is not bound to submit to any loss which might arise from an apportionment of the price paid by him. *Rathnasami v. Subramanyu* (1887), 11 Mad., 56. The amount of interest is governed by sec. 84 of the Act. *Debendra v. Pulin* (1897), 24 Cal., 763.

When payment must be made.—In order to obtain the benefit of this section the mortgagor must pay the price and incidental expenses, &c., with interest into court either in or before the action. *Muchiram v. Ishan* (1894), 21 Cal., 568. Cf. *Russick v. Romanath* (1894), 21 Cal., 792 ; *Debendra v. Pulin* (1897), 24 Cal., 763 ; but see *Nilakanto v. Krishnasamy* (1889), 13 Mad., 225. But payment into court under such circumstances as to amount only to a conditional tender will not be a good payment. *Anand Rao v. Durgabai* (1897), 22 Bom., 761. It should be noticed that a person

does not lose the benefit of this section, if he merely puts the assignee to proof of the price paid by him and waits until it has been determined by the court. *Debendra v. Pulin* (1896), 23 Cal., 713; *Jani Begam v. Jahangir Khan* (1887), 9 All., 476; cf. *Rajendro v. Watson & Co.* (1891), 18 Cal., 510.

CL. (b). The exception would apply where the whole of the consideration for the transfer is a debt due by the transferor. *Chinnam v. Tadikonda* (1905), 29 Mad., 155.

Where the judgment of a competent court, &c.—Where the obligee had previously to the assignment obtained a decree by consent against the obligor for an instalment of the money due upon a mortgage-deed, it was held that there had been no adjudication on the claim for the remaining instalments. *Rama v. Venkata* (1890), 13 Mad., 516. The word 'judgment' is wide enough to include foreign judgments. *Vythilingam v. Sitharam* (1899), 23 Mad., 449. Assessment of value of crops on a tenant's holding under section 42 of the N.-W. P. Rent Act is a judgment within this clause. *Mathura v. Murli* (1902), 24 All., 517. The provisions of this section seem to have been borrowed directly from the Code of Lower Canada, §§ 1582, 1584; but their pedigree can be clearly traced to the Roman law. "Generally," says Dr. Hunter, 'there was no impediment to a transfer, except in the case where the transfer was made in order to vex a debtor with a more powerful creditor (C. 2, 14, 2). But Anastasius introduced a more effective protection to debtors. The evil that he redressed was the sale of debts for less than their amount to persons that made a trade of harassing debtors. He enacted that no transferee of a debt should recover more from the debtor than he had paid to the transferer, with lawful interest. The exception was when co-heirs or legatees divided debts among them, assigning to them a value in the division below their real amount. Anastasius did not interfere with transfers made by way of gift (C. 4, 35, 22) and this opened the door to evasion. Part of the debt was transferred for a sum intended really to be the price of the whole, and the residue of the debt was transferred as a gift. Justinian put a stop to this evasion by enacting that if a person meant to transfer a debt as a gift, he must give the whole, and not a part of it; and when anything was paid at all, the transferee was prohibited from receiving any more.' (C. 4, 35, 23) Hunter's Roman Law, p. 628. Cases of claims ceded to eliminate a debt or as security for a possession were also excluded from the operation of the *Lex Anastasiana*. The burden of proof as to the amount paid fell upon the assignee. Colquhoun's Roman Civil Law, § 1758. In England where A devised an estate to his heir, who, in his own right, had a charge on it, and the heir bought up an incumbrance on the estate amounting to £11,555 for £2,000; it was held

What judgments are included.

Roman law the subject.

that he was entitled to the full amount, as against the other incumbancers on the estate. *Davis v. Barrett* (1851), 14 Beav., 542; cf. *Darcey v. Hall* (1862), 1 Vern., 48; disting. *Degamburee v. Eshan* (1868), 9 W. R., 230. See also *Ascough v. Johnson* (1688), 2 Vern., 66; *Phillips v. Vaughan* (1685), 1 Vern., 335; *Williams v. Springfield* (1687), 1 Vern., 476; *Long v. Clopton* (1687), 1 Vern., 464; *Brathwaite v. B.* (1685), 1 Vern., 334; *Hill v. Browne* (1844), Dr., 426.

THE SCHEDULE.

Year and chapter.	Subject.	Extent of repeal.
(a) STATUTES.		
27 Hen. VIII, c. 10 ...	Uses ...	The whole.
13 Eliz., c. 5 ...	Fraudulent conveyances	The whole.
27 Eliz., c. 4 ...	Fraudulent conveyances	The whole.
4 Wm. and Mary, c. 16.	Clandestine mortgages...	The whole.
(b) ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.		
IX of 1842 ...	Lease and release ...	The whole.
XXXI of 1854 ...	Modes of conveying land	Section 17.
XI of 1855 ...	Mesne profits and improvements.	Section 1; in the title the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and."
V of 1866* ...	Policies of Insurance (Marine and Fire) Assignment.	The whole.
XXVII of 1866 ...	Indian Trustee Act ...	Section 31.
IV of 1872 ...	Punjab Laws Act ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 ...	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.

* Sec. 5, Act II of 1900.

Year and chapter.		Subject.		Extent of repeal.
XVIII of 1876	...	Oudh Laws Act	...	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877	...	Specific Relief	...	In sections 35 and 23, the words "in writing."
XIV of 1897*	...	Indian Short Titles	...	So much as relates to Act V of 1866.

(c) REGULATIONS.

Bengal Regulation I of 1798.	Conditional sales	...	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption	...	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts ; Interest ; Mortgagees in possession.		Section 15.

* Sec. 5, Act II of 1900.

CIVIL PROCEDURE CODE, 1908.

SCH. I, ORDER XXXIV.

Suits relating to Mortgages of Immovable Property.

1. Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Parties to suits for foreclosure, sale and redemption.

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit ; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

This rule has been taken from sec. 85 of the Transfer of Property Act, now repealed. The words “ in the mortgage-security or in the right of redemption ” have been substituted for “ in the property comprised in a mortgage. ” An explanation has been added and the proviso relating to notice is omitted. The explanation was rendered necessary as it was generally thought that sec. 85 made it imperative on a puisne mortgagee to make a prior mortgagee a party to his action for foreclosure, and the alterations have made it clear that an adverse claimant who is a stranger to the security or the equity of redemption need not be joined. See pp. 583, 586, *ante*. See also *Monmohini v. Parnati* (1905), 32 Cal., 746 ; *Jogo Mohan v. Daudoon* (1907), 12 C. W. N., 94. If the mortgagee does not include in his suit portions of the mortgaged property in which third persons are interested, he is not bound to make such persons parties to the suit. *Sheo v. Sheodan* (1905), 28 All., 174 ; 2 A. L. J., 630 ; *Ponnusami v. Srinivasa* (1908), 31 Mad., 333. In such a case the mortgage should be treated as split up. See also *Hari v. Veliat* (1903), 30 Cal., 755 ; 7 C. W. N., 723 ; *Surjiram v. Barhamdeo* (1905), 2 C. L. J., 202.

Changes made in the rule.

Where portion of property given up.

Subject to the provisions of this Code—See pp. 587, 588, *ante*. Order 31, rule 1 of the Code (sec. 437 of the old Code) enacts that it shall not be ordinarily necessary to make persons beneficially interested in property vested in a trustee, executor or administrator,

Representa-
tion of parties.

parties in suits concerning such property where the contest is between the persons beneficially interested and a third person. In England before the addition in 1893, to Order 16, rule 8, of the Rules of the Supreme Court, trustees and executors although competent to represent their beneficiaries as plaintiffs in a redemption-action, were not deemed competent to represent them as defendants in an action of foreclosure, unless they were likely to be in possession of funds sufficient to enable them to redeem. *Mills v. Jennings* (1880), 13 Ch. D., 639; *Francis v. Harrison* (1889), 43 Ch. D., 183; see also *Aylwood v. Lewis* (1891), 2 Ch., 81; *Goldsmid v. Stonehewer* (1852), 9 Hare, App. XXXVIII. Since the alteration of the rule they represent their *cestuis que trust* in foreclosure-actions. *In re Booth and Kettlewell's Contract* (1893), 62 L. J., Ch., 40. An administrator *pendente lite*, however, does not sufficiently represent the mortgagor's estate. *Ellis v. Deane* (1814), Beat. 5; *Cave v. Cork* (1843), 2 Y. & C., Ch., 130. As to the representative capacity of the father in a Mitakshara family, see in addition to the cases cited in note 5, page 588, *ante*, *Debi v. Jia* (1902), 25 All., 214; *Lal Singh v. Pulandar* (1905), 28 All., 182; *Sundar v. Chhitar* (1906), 29 All., 1, 215; *Balwant v. Aman* (1910), 33 All., 7; *Tatyarao v. Puttappa* (1910), 12 Bom. L. R., 940; *Kehri v. Chunni* (1911), 33 All., 436; *Balki v. Brojobasi* (1912), 16 C. L. J., 1019; Mayne's Hindu Law, sec. 311. As regards the representative capacity of a managing member, see *Jadoo v. Sheo* (1910), 33 All., 71. *Ramakrishna v. Vinayak* (1910), 12 Bom. L. R., 219; *Chimna v. Sada* (1910), 12 Bom., L. R., 811. *Hori v. Munman* (1912), 34 All. 549; *Madan v. Kishan* (1912), 34 All. 572.

Representa-
tive capacity
of father of
Mitakshara
family :

And of manag-
ing member.

An interest either in the security or in the equity of redemption :—

This would include a floating security on the mortgaged property. *Wallace v. Evershed* (1889), 1 Ch., 891. For the application of the rule to suits for foreclosure or sale, see pp. 578—590, *ante*; *disting.* *Chapman v. Duncombe* (1690), 2 Ver., 142. The English practice is thus stated in 2 W. & T. L. C., p. 43. "As a general rule all persons interested in the equity of redemption, and therefore in the proper taking of the account, either primarily as the mortgagor or derivatively as the trustee in bankruptcy of the mortgagor, the assignees of the equity of redemption, the devisee and heir of the mortgagor and his personal representative, and also all persons interested in the security primarily as the mortgagee or derivatively as his heir, or personal representative or as assignee or devisee of the security or debt, are necessary parties to foreclosure and redemption action." The rule is thus stated in Story's Equity Pleadings, § 193 :—"The general doctrine may be asserted, that all persons, whose interests are to be affected or concluded by the decree, ought to be made parties

Practice in
England.

Therefore all persons having an interest in the equity of redemption, should be made parties to a bill of foreclosure, and *à fortiori* to a bill to sell the mortgaged property; for it will not in general be sufficient, if the equity of redemption is conveyed or devised to a trustee in trust, to bring him before the court; but the *cestuis que trust* (the beneficiaries) also should be made parties. If on the other hand the *cestuis que trust* are brought before the court, it should seem that the trustees are not indispensable parties. So, if the equity of redemption belongs to different persons as devisees, or as legatees having charges thereon, all of them should be joined as defendants. And hence it has been asserted to be the general (although not the universal) rule, that all encumbrancers, as well as the mortgagor, should be made parties: if not as indispensable, at least as proper parties to such a bill, whether they are prior or subsequent encumbrancers. Prior encumbrancers are properly made parties to a foreclosure for the purpose of ascertaining and paying off the amounts due to them. The prior mortgagee, when thus joined, may properly file a cross-bill to enforce his mortgage and to have its validity and priority established. There are certainly some acknowledged exceptions; such, for examples, as where a second mortgagee brings a bill to foreclose against the mortgagor, and a third mortgagee: for in such a case the first mortgagee need not be made a party. And it may now well be doubted, whether in any case it is necessary for a puisne mortgagee, who seeks to sustain a bill of foreclosure against the mortgagor and subsequent mortgagees to himself, to make any prior mortgagee to himself a party to the bill. If, indeed, any encumbrancers (whether prior or subsequent) are not made parties, the decree of foreclosure does not bind them, as, also, a decree of sale would not. The prior encumbrancers are not bound, because their rights are paramount to those of the foreclosing party. The subsequent encumbrancers are not bound; because their interests would otherwise be concluded without any opportunity to assert or protect them." Thus where a mortgagee of two estates filed a bill against the mortgagor and a second mortgagee of one, praying for a foreclosure of that only, alleging that the mortgagor had sold the other to a purchaser without notice; it was held that such a purchaser was a necessary party because in his absence, 'a final end could not be made of the controversy.' *Payne v. Compton* (1837), 2 Y. & C., 457; distinguishing *Rammoy v. Prem Chand* (1901), 5 C. W. N., 423. For parties to a suit brought by one out of several mortgagees, see pp. 578, 579, *ante*. Where a plaintiff relinquishes a part of the mortgaged property and seeks to sell or to foreclose the mortgage in respect of the remainder it is not necessary to make the persons interested in the portion of the property so relinquished parties to the suit. *Sheo v.*

Rule stated by Story.

Absent parties not bound by decree.

Where mortgagee relinquishes a part.

Sheodan (1905), 28 All., 174; 2 A. L. J., 630. So also in the case of a suit for redemption of a portion. *Nazir v. Nihal* (1905), 2 A. L. J., 628. But persons setting up paramount claims should not be joined as parties. See pp. 583—586, *ante*, see also *Fisher*, secs. 1693, 1694. Cf. *Audsley v. Horn* (1858), 26 Beav., 195. As regards actions for foreclosure or sale by sub-mortgagee, see the cases cited in note 5, p. 581, *ante*; and *Bansi v. Durga* (1908), 9 C. L. J., 429; *Zaki v. Deo* (1909), 10 C. L. J., 470; *Bhanessar v. Ram* (1910), 12 C. L. J., 137; *Someshwar v. Naranbhai* (1910), 13 Bom. L. R., 90; cf. *Bruiton v. Birch* (1853), 22 L. J. Ch., 911. For procedure where there are numerous parties, see p. 587, *ante*; see also *Re Continental & Co.* (1897), 1 Ch., 511; cf. *Holland v. Baker* (1842), 3 Hare, 68; but see *Fairfield, &c., Co. v. London, &c., Co.*, W. N. (1895), 64. Mere contingent interests need not be represented, see p. 587, *ante*; cf. *Marriott v. Kirkham* (1862), 3 Giff., 536; *Browne v. Cork* (1841), 1 Dr. & Wal., 700; nor persons with an inchoate title. *Nanjundepa v. Hemapa* (1884), 9 Bom., 10. It is also not necessary to join persons whose prior right is admitted. *Srinivasa v. Yamunabhai* (1905), 29 Mad., 84.

A person cannot be both plaintiff and defendant.—In a foreclosure-action by a first mortgagee where the plaintiff also joined himself as a defendant as one of the puisne mortgagees, his name was struck out as a co-defendant. *Wavell v. Mitchel* (1889), 64 L. T., 560.

Necessary parties in an action for redemption.

Who are necessary parties to a suit for redemption.—In an action for redemption, the mortgagee can compel the mortgagor to work out the remedy sought by him by paying off the mortgage or on default to submit to foreclosure. He may, therefore, require that the suit shall be so framed as to enure to his benefit whether it is instituted by the mortgagor himself or by persons claiming partial interests carved out of the equity of redemption. It follows that all persons interested in the equity of redemption should be joined as parties, so that they may be bound by the foreclosure in the event of default of payment. See pp. 608—610, *ante*: see also *Dataram v. Gangaram* (1898), 23 Bom., 287, where it was held that the mortgagor is a necessary party to a suit by a second mortgagee to redeem the first mortgage, especially if the second mortgage was created in contravention of the provisions of sec. 29 of the Guardians and Wards Act, 1890. Cf. *Palk v. Lord Clinton*, (1805), 12 Ves., 48, where the second mortgage was only of part of the estates comprised in the first and under a different title. But a person not having any interest in the mortgage at the time of the suit need not be added as a party. *Ragho*

v. *Daul* (1888), 13 Bom., 51; *Trimbak v. Sakharani* (1891), 16 Bom., 599. In one case where the co-sharers of the plaintiff were not parties to the suit, it was held that the decree should be made expressly without prejudice to the rights of any kind whatsoever of the other co-owners in the property, and especially without prejudice to their right, if any, to deny that the plaintiff's vendor had any share or interest in the property, and without prejudice to their right to redeem the same at any time allowed by the law of limitation, if the plaintiff failed to redeem within the period of six months allowed by the decree, and without prejudice to any question that might arise between the plaintiff and the co-owners of his vendor as to the share to be borne by the latter of the redemption-money which might be paid by the plaintiff. *Ganpati v. Damodar* (1874), Bom. P. J., 2. There can, however, be no doubt that, as a rule, all the assignees of the equity of redemption should be made parties, so that the account may be taken once for all. *Apa v. Salan* (1889), Bom. P. J., 246; cf. *Bhauddin v. Ismail* (1887), 11 Bom., 425. Disting. *Waters v. Mynn* (1853), 14 Jur., 341. And it makes no difference that the mortgagee has permitted some of the owners to redeem their share of the mortgaged property. *Aliter*, if there has been a complete severance of the equity of redemption, and the plaintiff seeks to redeem not the whole of the remainder, but only his share in the mortgaged property. See pp. 244, 250, *ante*: cf. *Deonarain v. Nark* (1870), 2 N.-W. P., 220. But the mortgagee cannot insist on the joinder of persons who are no parties to the mortgage-deed, though they may have an interest in the equity of redemption. *Hasaji v. Kahanjibhai* (1888), Bom. P. J., 237. An assignee of a mortgage, or a sub-mortgagee, is also a necessary party to a suit to redeem where the mortgagor knows or has constructive notice of the assignment or sub-mortgage, though no formal notice of the assignment or sub-mortgage has been given to him. *Balshet v. Ganesh* (1874), Bom. P. J., 155; *Narayan v. Maruti* (1878), Bom. P. J., 201. But the plaintiff is not bound to notice assignments of prior incumbrances, merely because the assignments are registered. *Webb v. Blessington, Lord* (1829), 1 Moll., 74. As regards rival claimants, it seems that the plaintiff in an action for redemption may implead other persons who claim the right to redeem in opposition to him. *Bhoop v. Nursing* (1868), 3 Agra, 144.

Parties in redemption-suits.

Where there has been severance of the equity of redemption.

In case of assignment or sub-mortgage.

Assignee pendente lite.—See the notes to sec. 52, *ante*. Cf. *Goburdhun v. Bishan* (1900), 23 All., 116. Under the Code of Civil Procedure, 1882, where a sale was confirmed by the court after the institution of a suit on a mortgage, the purchaser was not a necessary party. See sec. 316 of the Code. Under the present Code the title vests in the purchaser from the date of sale. See sec. 65, Civil Proce-

Code, 1908. Cf. *Bhoyrub v. Shoudamini* (1876), 2 Cal., 141; *Rameshwar v. Mewar* (1885), 11 Cal., 341, which seems to have been decided on the assumption that the law had not been altered by the Code of 1877.

When suit
abates on
death of
party.

Abatement.—A mortgagee of a tenant for life of the equity of redemption filed a bill against the mortgagees of the fee and the remaindermen for redemption or foreclosure. The tenant for life having died between the setting down of the case and the hearing, the bill was dismissed with costs. *Riley v. Croydon* (1864), 2 Dr. & Sm., 293. Where the original mortgagee died pending an action for redemption, it was held that the suit could not proceed against the sub-mortgagee in the absence of the legal representative of the mortgagee. *Pudgaya v. Raji* (1895), 20 Bom., 549. And if the mortgagor dies before foreclosure absolute, the court will not make the decree absolute in the absence of a properly constituted representative of the mortgagor. *Aylward v. Lewis* (1891), 2 Ch., 81.

Procedure
when neces-
sary parties
not joined.

Duty of Court when all necessary parties are not before it.—See pp. 590, 591, *ante*. For the practice in England see *Hall v. Heward* (1886), 32 Ch. D., 430; cf. *Faulkner v. Daniel* (1843), 3 Hare, 199, 212, 213, decided under Lord Cottenham's orders of 1841. The provisions of this section are equally applicable to appeals, and the absence of any person interested in the mortgage, though he may not be interested in the result of the appeal, will, it seems, be fatal to the maintenance of the appeal. *Manakal v. Collector of Malabar* (1899), 9 M. L. J., 49; cf. *Kesavan v. Sankaran* (1897), 7 M. L. J., 266. In one case where it was discovered after judgment had been obtained against the alleged heir-at-law of the mortgagor that there was no evidence of the defendant's heirship, the court ordered the judgment to be set aside at the instance of the mortgagee. *Lancaster, &c., Co. v. Cooper* (1878), 9 Ch. D., 594.

Effect of non-
joinder of
parties.

Effect of non-joinder.—It may appear that a rigid adherence to the provisions of this rule might in many cases make the successful prosecution of a suit for foreclosure almost impossible, specially in this country where an extensive estate has been mortgaged and a large number of tenancies have been subsequently created by the mortgagor. In practice, however, no such inconvenience is ordinarily felt, because although the absent parties cannot be bound by the decree, it would certainly conclude all who are actually parties to the action, comprehending any interest which may be possessed by them in another character, though such interest does not appear upon the proceedings. *Bromitt v. Moore* (1851), 9 Hare, 374; *Goldsmid v. Stonehewer* (1852), 9 Hare, App. XXXIX. A mortgagor will, it seems, be bound by a

decree in appeal to which he is not a party, if his interest is identical with that of the appellant; at any rate he cannot get rid of the adverse decree otherwise than by a proceeding in the suit out of which the appeal arose. *Farquharson v. Seton* (1828), 5 Russ., 45. But a person who becomes entitled after the decree to another interest in the mortgaged estate derived from a person who was not a party to the suit, will be entitled to redeem by virtue of his newly acquired interest. *Bromitt v. Moore*, supra; but in such cases the plaintiff is bound to state in the plaint the grounds on which he seeks to treat the decree as ineffectual. It should also be remembered that persons who have no substantial interest are not likely to bring actions for redemption. Nevertheless the necessity of making all persons interested in redeeming the estate parties to the action cannot be too strongly insisted upon; for no foreclosure or sale in their absence can pass an irredeemable estate, nor can a decree made in their absence affect their rights in any way whether the plaintiff has or has no notice of their interest. *Mallikarjunadu v. Linga* (1902), 26 Mad., 332; *Rangasamy v. Jelli* (1902), 26 Mad., 484; *Goverdhanu v. Veerasami* (1902), 26 Mad., 537; *Hassanbhai v. Umaji* (1903), 28 Bom., 153; *Bunsee v. Genu* (1911), 14 C. L. J., 530; *Mulla v. Achuthan* (1911), 21 M. L. J., 213; cf. *Muhammad v. Abdulla* (1900), 24 Mad., 171; *Kudrat v. Kubra* (1900), 23 All., 25; see also *Sivaraman v. Kupppumuthu* (1903), 13 M. L. J., 72, where the rights of a puisne mortgagee and the purchaser under a decree of a prior mortgagee to which the former was not a party were discussed. In *Ganeshi v. Charan* (1913), 35 All., 247, the plaintiffs having by an oversight omitted to implead certain persons who owned a share in the mortgaged property, it was held that they were entitled to a decree for a proportionate share of the claim only. A suit brought against a wrong person as representative of the mortgagor does not affect the title of the real heir. *Gouri v. Sita* (1909), 14 C. W. N., 346; and a decree on appeal wrongly carried on by the legal representatives of a widow in a suit for foreclosure does not bar a suit for redemption by the reversionary heir. *Kailash v. Giriya* (1912), 39 Cal., 925. For an instance where the court allowed the prior mortgagee, who had brought a suit for possession against the puisne mortgagee after he had purchased the property in execution of a decree to which the puisne mortgagee was not a party, to amend his plaint and ask for sale, see *Kutti v. Achutan* (1911), 21 M. L. J., 475. The proviso relating to notice in the repealed sec. 85 of the Transfer of Property Act created an impression that the rights of a person, whom the plaintiff was not bound to join as a party, might be cut off by a decree in a suit in which he was not represented. There can be no doubt, however, that the ignorance of the plaintiff cannot affect

Effect of non
joinder of
parties.

Rights of per
sons not
parties are
unaffected by
decree.

Effect of
notice.

Accounts how
far binding
on absent
parties.

the right to redeem of any person interested in the equity of redemption. But though persons who ought to have been joined as defendants can claim the right to redeem, in the absence of fraud or collusion they can only unravel the accounts by proving particular errors. Fisher, sec. 1705. See also *Needler v. Deeble* (1670), 1 Ch. Ca., 299; *Williams v. Day* (1676), 2 Ch. Ca., 32; *Knight v. Bamfield* (1683), 1 Vern., 179. But this statement of the law, which is taken from Fisher, probably requires a slight qualification. In order to bind an absent party the accounts must have been taken "fairly," which implies something more than the mere absence of fraud, namely, the presence of parties substantially interested in the equity of redemption. *Wrixon v. Vize* (1839), 2 Dr. & W., 192, 204; *Naran v. Dalatram* (1882), 6 Bom., 538; *Sankana v. Virupakshapa* (1883), 7 Bom., 146; *Radhabai v. Shamrav* (1881), 8 Bom., 168; *Dadoba v. Damodar* (1891), 16 Bom., 486; cf. *Venkata v. Kamnam* (1882), 5 Mad., 184; *Damodar v. Naro* (1881), 6 Bom., 11. On this principle, though accounts taken in the presence of the tenant for life will bind the remainderman, whether his interest is vested or contingent, the latter will not be bound by accounts taken not only in the absence of the tenant for life, but also of every other person interested in their correctness. *Allen v. Papworth* (1785), 1 Ves. Sen., 163; *Wrixon v. Vize* (1839), 2 Dr. & W., 192, *Dick v. Butler* (1827), 1 Moll., 42. See also *Morret v. Westernue* (1710), 2 Vern., 663; *Ormsley v. Thorpe* (1882), 2 Moll., 503. Cf. *Anant Rao v. Taty* (1888), Bom. P. J., 37; *Wasudev v. Narayan* (1882), Bom. P. J., 21; *Kisan v. Krishnaji* (1882), Bom. P. J., 177; *Mansukh v. Tarbhoban* (1882), Bom. P. J., 273; *Gonesh v. Bal Krishna* (1879), Bom. P. J., 28; *Shiv Lal v. Jechand* (1879), Bom. P. J., 482; but see *Shioram v. Genu* (1882), 6 Bom., 515; *Ram v. Lachman* (1899), 21 All., 193; *Suraj v. Golab* (1901), 28 Cal., 517; 5 C. W. N., 640; which also lay down that the burden of proving the existence of notice lies on the person who seeks to redeem on the ground that he was unrepresented in the previous action. It would, however, seem to be the duty of the mortgagee when he seeks to foreclose to discover the persons who are entitled to the equity of redemption whether they are in possession or not. *Norender v. Dwarka* (1877), 3 Cal., 397. And possession should certainly put him on enquiry. *Narayan v. Maruti* (1878), Bom. P. J., 201; *Balshet v. Gonesh* (1874), Bom. P. J., 154. But where a puisne mortgagee is in possession not actually by himself, but by tenants, it cannot be inferred that the prior mortgagee had notice of his mortgage. *Wasudev v. Narayan* (1882), Bom. P. J., 21. See the question discussed in the notes to sec. 3, *ante*. **Registration of subsequent mortgage.** See pp. 444, 445, *ante*; cf. *Rupchand v. Davlatrav* (1882), 6 Bom., 495; *Jadu v. Radha*

When mort-
gagee said to
have notice.

(1901), 5 C. W. N., lxxxiii; *Rahabai v. Shanurav* (1881), 8 Bom., 168; see also *Webb v. Blessington, Lord* (1829), 1 Moll., 74. The right of a puisne mortgagee, who was not joined as a party to the suit of the prior mortgagee, has, is what he could have claimed if he had been a party to the suit, namely, a right to redeem the prior mortgage with a view to enforcing his own mortgage. *Goverdhana v. Veerasami* (1902), 26 Mad., 537; *Hassanbhai v. Umaji* (1903), 28 Bom., 153; 5 Bom. L. R., 892; *Debendra v. Ram* (1903), 30 Cal., 599; *Saulagar v. Jan Ali* (1904), 1 A. L. J., 300; *Phulmani v. Nageshar* (1911), 33 All., 370; 8 A. L. J., 155; *Ponnambala v. Muthusami* (1912), 23 M. L. J., 284. As to the rights of such a person against a purchaser in execution of the decree, see pp. 621—627, *ante*, and in addition to the cases cited above, see *Kedar v. Girindra* (1908), 8 C. L. J., 173, where the preferential right to redeem was said to be with the puisne mortgagee. The puisne mortgagee may sue to redeem the purchaser as mortgagee or thereafter as mortgagor to foreclose or suffer himself to be redeemed by him. *Pandurang v. Sakharchand* (1906), 31 Bom., 112; 8 Bom. L. R., 861. As to whether the rights of an absent party can be enforced in a suit brought by him for possession, see in addition to the cases cited in note 3, p. 614, *ante*, *Kutti v. Subramania* (1909), 32 Mad., 485, where such a claim was not allowed.

Account taken on what footing at the instance of absent party.—See p. 627, *ante*. In *Ram Pershad v. Gobindi* (1904), 1 A. L. J., 207, the puisne mortgagee was held to be bound to pay interest at the stipulated rate up to the date of payment notwithstanding that the former decree against the mortgagor did not allow the mortgagee interest at that rate. See also *Kedar v. Kedar* (1904), 1 A. L. J., 492.

For the old law on the subject, see *In re Horce Mohon* (1871), 15 W. R., 486; *Hoolash v. Sufcehun* (1867), 8 W. R., 379; *Mobaruck v. Gobind* (1872), 18 W. R., 61; *Soobuns v. Ishur* (1874), 21 W. R., 150; *Grish v. Ganga* (1876), 25 W. R., 60; *Mujeedoonessa v. Dildar* (1870), 14 W. R., 216, a suit by some of the heirs of a Mahomedan mortgagee; see also *Blaquiere v. Randhone* (1865), Bourke, o.c., 319; where the necessity of adding the personal representative of an English mortgagor under the old law was discussed.

Fresh suit by mortgagee.—An order *nisi* was made against a mortgagor, and subsequently the plaintiff, first mortgagee, discovered that there were other incumbrancers. He brought a second action against these incumbrancers without joining the mortgagor, but the court ordered him to be joined. *Moore v. Morton* (1887), 31 Sol. Jo., 110; *disting. Rammoy v. Prem* (1901), 5 C. W. N., 423. See also

Right of
puisne mort-
gagee when
not made
party.

How account
taken at the
instance of
absent party.

Balmukund v. Sangari (1897), 19 All., 379; *Baldeo v. Jaggu* (1900), 23 All., 1; *Lachhman v. Dallu* (1900), 22 All., 394; *Badam v. Hari* (1911), 16 C. L. J., 38; *Rashid-un-nissa v. Muhammad* (1912), 34 All., 474; cf. *Bolakee v. Pertam* (1880), 5 Cal., 928.

When party
is bound to
set up prior
right.

Where decree will operate as an estoppel.—A decree in a mortgagee's suit to have priorities declared, and to ascertain amounts due, is an estoppel to a party in the suit who seeks to invalidate the security of a prior incumbrancer. *Forde v. Tynte* (1864), 10 L. T., 93. But where a person is sued only as a subsequent mortgagee and as such is called on merely to redeem, the decree will not estop him from setting up a prior mortgage. *Dhapi v. Barham* (1899), 4 C. W. N., 297, 303. So where the plaintiff did not ask for the sale of the property free from any prior incumbrance, the subsequent mortgagee is not bound to set up any prior mortgage he may have on the property. But the plaintiff will not be allowed to plead in a subsequent suit that his puisne mortgage was entitled to priority over the second mortgage on any ground which was not raised in the previous suit. *Mahabir v. Prabhu* (1908), 9 C. L. J., 78. See pp. 585, 586, *ante*. Cf. *Carritt v. Real and Personal, &c.* (1889), 42 Ch. D., 263. It seems that though the determination of an issue may not be *res judicata* under sec. 11 of the Code of Civil Procedure, it may, nevertheless, be binding upon the parties. *Krishnaswami v. Srinivasa* (1900), 11 M. L. J., 7. In *Mahomed v. Ambica* (1912), 39 I. A., 68; 39 Cal., 527, it was held that when a necessary party to a mortgage-suit was made a party any prior rights he might claim were barred under sec. 13 of the Code of Civil Procedure, 1882 (now explanation (4) sec. 11) by his omission to put those rights in issue in the previous suit. It is however doubtful whether their Lordships intended to lay down any general principle. See also *Gajadhar v. Bhagwanta* (1912), 10 A. L. J., 244.

Preliminary
decree in
foreclosure-
suit.

2. In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree—

(a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree,
and directing—

- (c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court the plaintiff deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but
- (d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property.

This rule corresponds with sec. 86 of the Transfer of Property Act now repealed. The words "if so required" in cl. (c) have been added, as a retransfer is not ordinarily required in this country. The provision regarding payment to the plaintiff has been omitted.

In a suit for foreclosure, &c.—See pp. 264—268, 591—598, *Right of foreclosure.* *ante*, and the notes to sec. 67 of the Transfer of Property Act. For a case in which it was held that a previous demand was necessary before the mortgagee could foreclose; see *Babaji v. Lakshman* (1887), Bom. P. J., 83. There can be no foreclosure only for costs. Where the debt in the nature of a mortgage-debt is paid off, the mortgagee, entitled to a balance consisting of costs only, cannot have a decree of foreclosure with costs in default of payment of such a demand for costs only. *Drought v. Redford* (1829), 1 Moll., 572; *disting.* *Subhana v. Krishna* (1892), Bom. P. J., 15.

Ordering that an account be taken, &c.—See p. 597, 598, *Taking of ante.* It seems the court would be justified in staying proceedings, *accounts.* when the accounts are asked for vexatiously and unreasonably. *Taylor v. Mostyn* (1883), 25 Ch. D., 48. But the taking of the accounts cannot

How accounts
taken.

be stopped altogether ; though the mortgagor may be called on to give security for the costs of taking them. *Exchange, &c., Ltd. v. Association &c.* (1886), 34 Ch. D., 195. Where, however, at a trial of a foreclosure action the plaintiff asks for a sale of the property, and the mortgagor does not appear, the court will dispense with an account of what is due, if it appears by the pleadings that the security is insufficient. *Williams v. Owen* (1882), 48 L. T., 388. It is hardly necessary to point out that if the parties have agreed that the accounts shall be taken in any particular way and the agreement is not unreasonable, effect will be given to it. *Radhabenode v. Kripa Moyee* (1872), 14 M. I. A., 443. As to the circumstances under which a settled account may be re-opened, see *Eyre v. Hughes* (1876), 2 Ch. D., 148 ; *Daniel v. Sinclair* (1881), 6 App. Cas., 181. It may be here noticed that the mortgagor will not be precluded from setting up a contemporaneous parol agreement providing for the means by which the mortgaged debt was to be discharged ; as for instance by letting the creditor into possession of the mortgaged property. *Gobind v. Narain* (1887), 9 All., 394. But see *Abdullah v. Basharat* (1912), 40 I. A., 31 ; 35 All., 48.

Principal.

Principal.—The word ‘principal’ is perhaps wide enough to include payments which the mortgagee has a right to add to his security. See pp. 502—504, 562, *ante*. Cf. *Provident and Society v. Greenhill* (1878), 9 Ch. D., 122. Anyhow, the mortgagee would be entitled to an account of what are known as just allowances and that even without any direction for that purpose in the judgment. See p. 592, *ante* ; cf. *Whelleer v. Macdonald* (1836), 1 Jur., 510 ; Seton, pp. 1976—1978 ; Daniell, 1145 ; and see O. 33, r. 8, R. S. C. But no allowance will be made for improvements without the special direction of the court ; and this will not be given where the mortgagee spends his money after having purchased the equity of redemption. *Murphey v. Meade* (1834), 1 Jones, 620, 624. The ordinary form of inquiry is “ whether anything and what is due to the plaintiff for any and what costs, charges and expenses properly incurred by him in respect of his mortgage-security not being costs of the action (beyond his costs of this action) ; and if it shall appear that anything is so due let the amount thereof be added to the principal and interest, &c.” Seton, p. 1957. For accounts and inquiries, as against mortgagee in possession, including wilful default, rents, repairs, and other special accounts and inquiries see Lect. XI, and the notes to sec. 76 of the Transfer of Property Act, *ante*.

Allowance for
improvements
whether
included.

Interest.

Interest.—A proviso limiting the “ total amount ” recoverable on a mortgage will not be construed as extending to the interest, or to outgoings. *White v. City of London Brewery Co.* (1889), 42 Ch. D., 237. The mortgagee will be credited with the rents and profits in lieu of in-

terest, if he has not been put into possession of the mortgaged property. *Ram v. Ahmed* (1892), Bom. P. J., 385. Disting. *Rameshar v. Kanahia* (1881), 3 All., 653; *Allah v. Sada* (1886), 8 All., 182. Interest is calculated up to the date fixed for payment. See p. 507, *ante*. *The Commercial Bank of India v. Ateendralayya* (1900), 23 Mad., 637. See also the remarks of Lord Langdale in *Brewin v. Austin* (1838), 2 Keen, 211. It seems that in the opinion of the Allahabad High Court though interest subsequent to the day fixed for payment may be allowed by a decree for foreclosure, the mortgagor may redeem without paying such subsequent interest. *Bhawani v. Brij Lal* (1894), 16 All., 269. The direction as to payment of interest at the rate stipulated in the bond "up to the date of payment" given in a mortgage-decree was held to refer not to the date fixed by the preliminary decree for payment but to the date of actual realization. *Radhika v. Brojendra* (1909), 14 C. W. N., 125. A decree for sale awarding interest up to the date of realization has been construed as allowing interest up to the date of the confirmation of the sale. *Megraj v. Nursing* (1906), 33 Cal., 846. But see *Maha Pershad v. Surendra* (1907), 9 C. L. J., 288. In the absence of any local usage the mortgagee is not entitled to interest for the day the money was advanced as also for the day on which the money was repaid. *Raghub v. Bhobui* (1903), 8 C. W. N., 216. As to when compound interest may be allowed, see p. 507, *ante*, and *Hari v. Ramji* (1904), 28 Bom., 371. In *Kutub-uddin v. Bashir* (1910), 32 All., 448, it was held that a mortgagee stipulating for a higher rate of interest in case of default in punctual payment is entitled to recover at the higher rate, if he reserves the higher rate as payable under the mortgage and provides for its reduction in case of punctual payment, but not if the higher rate is fixed in case of non-payment of a lower rate at the appointed time. For cases in which a personal remedy is sought against the mortgagor, see *Poulett v. Hill* (1893), 1 Ch., 277. As to the rule of damdupat, see pp. 507—509, 566, *ante*. The rule is applicable even when the person entitled to sue on a mortgage happens by assignment to be a Parsee if it could be applied when the mortgage was entered into. *Jeewanbai v. Manordas* (1910), 35 Bom., 199; 12 Bom. L. R., 992. The rule does not forbid the conversion of interest into capital by subsequent agreement between the parties. *Sakulal v. Bapu* (1899), 24 Bom., 305. The rule does not apply to the interest accruing after the date fixed for redemption under a decree passed on a mortgage, when the relation between the parties has passed from the realm of contract into that of judgment. *Nanda v. Dhirendra* (1913), 40 Cal., 710. **Interest recoverable by way of damages.** Their Lordships of the Privy Council in one case gave directions

Interest
calculated up
to what date.

Compound
interest.

Rule of
Damdupat.

which would go to show that a sum recoverable by way of damages is really part of the mortgage-money. *Mathura v. Narindar* (1896), 23 I. A., 138; 19 All., 39. But the whole law on the subject seems to be in a rather fluid state; see the cases in p. 504, *ante*. See also an article on the subject in 1 M. L. J., 82.

Rule in
Clayton's case
when applied.

Appropriation of payments.—See pp. 509—513, *ante*. The rule in *Clayton's case* (1816), 1 Mer., 572, that payments carried by a creditor to a current account which is communicated to the debtor are to be appropriated to liabilities in order of date is founded on a presumption of the creditor's intention and will not be applied in a case where it is proved by the conduct of the parties that the creditor had no such intention. *Deeley v. Lloyd's Bank* (1910), 1 Ch., 648; cf. *Sadhu v. Vithal* (1887), Bom. P. J., 343. Equitable set-off. See *Dodd v. Lydall* (1841), 1 Hare, 333.

On a day within six months, &c.—For circumstances under which an immediate decree for foreclosure may be made, see *Wolverhampton, &c., Co. v. George* (1883), 24 Ch. D., 707.

When forms
of relief may
be combined.

Order for personal payment.—It may be here noticed that though an English mortgage must contain a covenant to pay, there is no provision in this section for an order for personal payment by the mortgagor. But there is no doubt that both forms of relief may be combined. See O. 2, r. 4 of the Code of Civil Procedure; cf. *Dymond v. Croft* (1876), 3 Ch. D., 512. For a form of judgment when the action combines both a claim on the covenant and a claim for foreclosure, see *Farrer v. Lacy, &c.* (1885), 31 Ch., D., 42; see also *Poulett v. Hill* (1893), 1 Ch., 277; *Hunter v. Myatt* (1884), 28 Ch. D., 181. A debenture charging all the property of the company, both present and future, including its uncalled capital, gives the registered holder the ordinary mortgagee's remedy by foreclosure, against the uncalled capital as well as the other property comprised in the security; *Sadler v. Worley* (1894), 2 Ch., 170, which also contains a form of foreclosure judgment on a mortgage-debenture. It seems that in England the Crown cannot be foreclosed, the judgment merely directing that in default of payment the mortgagee be at liberty to hold the mortgaged property until the Crown shall think fit to redeem it. *Hancock v. A.G.* (1864), 33 L. J. Ch., 661; *Bartlett v. Rees* (1871), 12 Eq., 395; Seton, pp. 1909, 1910. Where the mortgage includes movable property, the proper order ordinarily is for sale of such property in the first instance and then for foreclosure in respect of the deficiency; *Dyson v. Morris* (1842), 1 Hare, 413; cf. *Bissett v. Jones* (1886), 32 Ch. D., 635.

Form of
judgment in
foreclosure-
action.

Form of judgment in an action for foreclosure.—See pp. 597, 598, *ante*. For a form of preliminary decree for foreclosure

see *post*, Form No. 3, Appendix D, of the first schedule to the Civil Procedure Code.

Where there are several successive mortgages.—See p. 603, *Form of ante*; Form No. 6, App. D, Sch. I, Civil Procedure Code, *post*. The form of order given is to be treated as a common form not to be literally followed in every suit for foreclosure, but to be adapted to the particular circumstance of each case. *Gopi v. Bansi* (1905), 32 I.A., 123; 27 All., 325; see also *Paine v. Edwards* (1847), 8 Jur. (N. S.), 1200; Seton, p. 1979; cf. *Narayan v. Pandurang* (1883), 7 Bom., 526; *Tulsa v. Khub Chand* (1891), 13 All., 581. A decree for foreclosure may also in a proper case define the rights of persons having paramount claims on the estate. *Jones v. Griffith* (1846), 2 Coll., 207. It should be here noticed that the plaintiff is *dominus litis* until decree and may put an end to the suit at any time he likes; and the other incumbrancers cannot object to it simply because they have trusted to the plaintiffs conducting the suit partly for their benefit. *Paynter v. Carew* (1854), Kay (App.) XXXVI. Cf. *Woodgate v. Field* (1842), 2 Hare, 214; see also pp. 583, 584, *ante*. The minutes of the order in a mortgagee's action, where possession of the mortgaged premises is *inter alia* claimed, should contain a direction that, in default of the defendant redeeming, he should deliver up possession of the mortgaged premises to the plaintiff, inasmuch as the order for possession is a conditional order like a foreclosure-order, and requires to be made absolute in the same manner. *Williamson v. Burrage* (1887), 56 L. T., 702. The common decree in foreclosure does not, however, direct the delivery up of the title-deeds by the mortgagor to the mortgagee in case of foreclosure, but merely that the mortgagor shall be absolutely barred and foreclosed of all right and equity of redemption; and it is only where there is a covenant to deliver them in case of default in payment of the principal money and interest that the court makes such a decree. *Wiseman v. Westland* (1826), 1 Y. & J., 117. But the court would not order a puisne mortgagee to deliver up a deed which shows on its face that it deals only with the equity of redemption. *Greene v. Foster* (1882), 22 Ch. D., 566. It was, also, not the practice in England before the Judicature Acts to order a purchaser for value to deliver up the title-deeds in his possession; but the law has now been altered. See *In re Cooper* (1882), 20 Ch. D., 617; *Manners v. Mew* (1885), 29 Ch. D., 725.

When order for delivery of deeds made.

Disclaiming defendants.—If some of the defendants in a foreclosure-suit disclaim, the court will decree them to be foreclosed, and not simply dismiss the bill as against them. *Parking v. Stafford* (1840), 10 Sim., 562. A mere disclaimer in a foreclosure-suit can be pleaded

as an answer to any further suit for redemption, but not in any other way. *Buxel, In re* (1849), 7 Eq., 399. See Seton, p. 1992.

Costs.
Mortgagee's
right to add
his costs to
security.

Costs of foreclosure.—See p. 619, *ante*. A right to add his costs to the security is treated in the English law as an indefeasible right of the mortgagee, except where he is guilty of misconduct; as, for instance, where he fraudulently denies the mortgagor's right to redeem, or retains possession of the property, claiming it as his own though he has been overpaid. *Cotterell v. Stratton* (1872), L. R., 8 Ch., 295; *Danstan v. Patterson* (1847), 2 Phillips, 341; *Turner v. Hancock* (1882), 20 Ch. D., 303; *Charles v. Jones* (1886), 33 Ch. D., 80; *Ashworth v. Lord* (1887), 36 Ch. D., 545; *Squire v. Perdoe* (1891), 40 W. R. (Eng.), 100; *Bolingbroke v. Hinde* (1884), 25 Ch. D., 795; *National, &c., Bank v. Games* (1886), 31 Ch. D., 582; see also *Morgan and Wurtzburg*, 221—240; Cf. *O'Neill v. Innes* (1864), 15 Ir. Ch., 527; *In re Watts* (1882), 22 Ch. D., 1. In *Detillin v. Gale* (1792), 7 Ves., 583, Lord Eldon remarked, "It is said it will be an extremely bad precedent to hold that in any case a mortgagee can be called upon to pay the costs of the mortgagor. I will not say the court will not, and I am very far from saying the court ought not, to make that precedent; but it ought to be made upon great consideration." It should be noticed that this rule applies only to the costs of the action. To entitle the mortgagee to an account of any other costs, *i.e.*, charges incurred by him, he must make out a special case; *Bolingbroke v. Hinde* (1884), 25 Ch. D., 795. See also *Binnington v. Harwood* (1823), Turn. & R., 477; *Kinnaird v. Trollope* (1889), 42 Ch. D., 610; *Broad v. Selfe* (1848), 9 Jur. (N. S.), 885; *Thomas v. Parker* (1846), 7 Jur., 844; *Morley v. Bridges* (1844), 2 Coll., 621. The rule deducible from the cases is that the right of the mortgagee to the costs of a foreclosure action will only be lost by vexatious, oppressive or fraudulent conduct on his part. See the notes to rule 7, *post*. Therefore though the mortgagor has no right of appeal on a mere question of costs, the disallowance of costs to the mortgagee is appealable as of right. Compare *Cotterell v. Stratton* (1872), L. R., 8 Ch., 295, 305; *Charles v. Jones* (1886), 33 Ch. D., 80; with *Turner v. Hancock* (1882), 20 Ch. D., 303; *M'Donnell v. M'Mahon* (1887), 23 L. R., Ir., 283. And this practice is generally followed by our courts. *Okhay v. Debendra* (1881), 8 C. L. R., 437, where attorney and client costs were given. Cf. *Chunder v. Essen* (1866), 1 Ind. Jur., 222; *Dada v. Bavosha* (1869), 6 Bom. H. C., a.c.j., 9; *Dhondo v. Balakrishna* (1883), 8 Bom., 190; *Carvalho v. Nurbibi* (1879), 3 Bom., 202; *Gunpati v. Damodar* (1874), Bom. P. J., 2; *Jamal v. Mahomed, Ib.*, 7; *Nana v. Babaji, Ib.*, 76; *Krishna v. Mohadaji*, 1893, Bom. P. J., 113; *disting. Kusha v. Hori* (1890), Bom. P. J., 67; *Sadashiv v. Bhivji* (1886) Bom. P. J., 10; and see Rule 9 of the Rules of the Calcutta High Court,

Right to costs
how lost.

When order
appealable.

under sec. 104, Transfer of Property Act and Rule 269, Madras, *ante*. The costs are a charge on the mortgaged property; and the mortgagor will not be personally liable for them, unless he is guilty of misconduct. See the cases cited at p. 619, *ante*; and *Shaffar v. Sattyanunda* (1908), 13 C.W.N., 742; Seton, pp. 1948—1951. Cf. *Nellerville v. Bennett* (1817), 2 Moll., 457; *Henry v. Byar* (1831), 1 Knapp, 338; *Johnstone v. Cox* (1881), 19 Ch. D., 17; but see *Eardley v. Knight* (1889), 41 Ch. D., 537, where it is said that though the mortgagee may bring into the mortgage-account the costs of an action by the mortgagor to impeach the security, he cannot add the costs of foreclosure to his mortgage unless they are expressly charged on the estate. Cases of foreclosure furnish an exception to the general rule that the losing party pays the costs. In the case of incumbrancers as an ordinary rule the costs are allowed to be added to their securities, if any difficult questions arise as to priority or the like; and unless there has been something vexatious or unusual in their conduct, they get their costs if the fund is sufficient to pay them. *Johnstone v. Cox* (1881), *supra*; *Eyre v. M'Dowell* (1861), 9 H. L. C., 619, 653; *Addison v. Cox* (1872), L. R., 8 Ch., 76. But though the costs of a mortgagee generally rank with his security, a puisne incumbrancer who recovers a fund for the benefit of all may claim to have his costs paid out of it in the first instance. *Wright v. Kirby* (1857), 23 Beav., 463; cf. *Ford v. Chesterfield* (1856), 21 Beav., 426; *Batten, &c., Scott Dartmouth, &c., Commissioners* (1890), 45 Ch. D., 612. And see rule 9 of the rules of the Calcutta High Court, and rule 269 of the Madras High Court. It should be noticed that when a mortgagee brings an action to foreclose two mortgages of two distinct estates, the costs of the action are not to be charged against each estate, but should be apportioned rateably between the two. *DeCaux v. Shipper* (1886), 31 Ch. D., 635; overruling *Clapham v. Andrews* (1884), 27 Ch. D., 679. A mortgagee's solicitor's costs for negotiating the loan and preparing the mortgage-deed cannot be added to the security as part of the costs, charges, and expenses properly incurred under or by virtue of his mortgage. *Wales v. Carr* (1902), 1 Ch., 860. For the practice with regard to the right of a disclaiming defendant to costs, see *Silcock v. Roynon* (1843), 2 Y. & C. C., 376; *Green v. Foster* (1882), 22 Ch. D., 566; *Buchanan v. Greenway* (1848), 11 Beav., 58; *Davis v. Whitmore* (1860), 28 Beav., 617; *Ward v. Shakesha* (1861), 8 W. R. (Eng.), 335; *Ford v. Clasterfield* (1853), 16 Beav., 516; *Dalton v. Lambert* (1846), 15 L. J. Ch., 208; *Gurney v. Jackson* (1852), 1 Sm. & G., 97; *Day v. Gudgen* (1876), 2 Ch. D., 209; *Lewin v. Jones* (1860), 53 L. J. Ch., 1011; *Clarke v. Toleman* (1876), 42 L. J. Ch., 23; *Land v. Wood* (1823), 1 L. J. (o.s.) Ch., 89; *Thompson v.*

When mortgagor personally liable for costs.

Apportionment of costs.

Right of disclaiming defendant.

Kendall (1840), 9 Sim., 397; *Collins v. Shirley* (1830), 1 Russ. & M., 638; *Ford v. White* (1852), 16 Beav., 120; *Clarke v. Toleman* (1876), 21 W. R. (Eng.), 66; *Staffurth v. Pott* (1848), 2 DeG. & Sm., 571; *Gibson v. Nicol* (1846), 9 Beav., 403; *Woodward v. Haddon* (1831), 4 Sim., 606; *Weaving Count* (1834), 6 Sim., 439; *Clark v. Wilmot* (1841), 1 Y. & C. C. C., 53; *Cork (Earl) v. Russell* (1871), 13 Eq., 210; *Hurst v. Hurst* (1853), 22 L. J. Ch., 546; *Gowing v. Mowbray* (1849), 9 Jur. (N.S.), 844; *Lock v. Lomas* (1854), 15 Jur., 162; *Roberts v. Hughes* (1868), 6 Eq., 20; *Higgins v. Frankis* (1850), 20 L. J. Ch., 16.

Receiver when
appointed.

Appointment of receiver.—See pp. 519, 520, 522, *ante*; *Seton*, pp. 783—785; cf. *Mason v. Westoby* (1886), 32 Ch. D., 206; see also *Tillet v. Nixon* (1883), 25 Ch. D., 238; *Pease v. Fletcher* (1875), 1 Ch. D., 273; *Taylor v. Sopers*, W. N. (1890), 121. A receiver may be appointed on the application of an equitable mortgagee. *Crowe v. Halliday* (1784), 2 Ridgw. P. C., 58; *Reid v. Middleton* (1822), T & R., 455; *Aberdeen v. Chitty* (1833), 3 Y. & C., 379; *Meaden v. Sealey*, 6 Hare, 620; *Holmes v. Bell* (1840), 2 Beav., 298. The court will also appoint a manager where it is necessary to protect the mortgaged property or to sell the business as a going concern; *Campbell v. Lloyd's, &c.*, *Bank* (1891), 1 Ch., 136 (n); *Makins v. Ibotson & Sons* (1891), 1 Ch., 133; *Edward v. Standard, &c., Syndicate* (1893), 1 Ch., 574. See also note 1, p. 597, *ante*. For form of order appointing a receiver and manager with an injunction, see *Turman v. Redgrave* (1881), 18 Ch. D., 547. But where a receiver is appointed at the instance of a mortgagee over property on which the mortgagor carries on business, the receiver cannot be directed to manage the business, unless such business is in express terms or by implication included in the security. *Whilley v. Challis* (1892), 1 Ch., 64. **Mortgage of undivided share.** *Fall v. Elkins* (1862), 9 W. R. (Eng.), 861; *Sumsion v. Crutwell* (1886), 31 W. R. (Eng.), 399. **Appointment after decree.** *Harris v. Shee* (1844), 6 Ir. Eq. R., 543. **On behalf of sub-mortgagee.** *Real, &c., Co. v. McCarthy* (1883), 27 W. R. (Eng.), 706. It should be noticed that money in the hands of a receiver in a foreclosure-suit is, in the first instance, to be treated as the plaintiff's fund. *Paynter v. Carew* (1854), 1 Kay, App. XXXVI.

Powers of
receiver.

Prior mort-
gages not
affected.

If a receiver is appointed on behalf of one of several incumbrancers, the order generally contains a declaration that the appointment of the receiver is to be without prejudice to the rights of prior incumbrancers on the estate, who may think proper to take possession of the estate by virtue of their respective securities; and usually directs that the receiver do, out of the rents and profits to be received by him,

keep down the interest and payments in respect of such incumbrancers, according to their priorities, and be allowed the same in passing his accounts. Seton, p. 414; cf. *Lewis v. Touche* (1828), 2 Sim., 381; *Smith v. Lord Effingham* (1839), 2 Beav., 232; *Underhay v. Read* (1886), 20 Q. B. D., 207.

A mortgagor is never permitted to dispute the title of his mortgagee.—See pp. 295—302, *ante*; cf. *Goodtitle d. Edwards v. Baily* (1777), Cowp., 601; *Doe d. Bristoe v. Pegge* (1785), 1 Term Rep., 760, n; 4 Dougl., 309. For the distinction between acts which are *ultra vires* and those which are illegal as being *malum prohibitum*, see *Turner v. The Bank of Bombay* (1900), 25 Bom., 52. A mortgagor cannot also deny his own title and the mortgagor's title should not be investigated in a foreclosure-action. *Gopal v. Jadu* (1911), 15 C. W. N., 915.

Mortgagor's estoppel.

Appeal.—The order *nisi* in a foreclosure-action is a decree for the purpose of an appeal from it, and not merely an interlocutory order. *Smith v. Davies* (1886), 31 Ch. D., 595. But it would seem that if an order under section 86 of the Transfer of Property Act, now repealed, was not appealed against in time, its validity could be questioned on the hearing of an appeal from the decree absolute under the next section. See *Biswanath v. Banikanta* (1896), 23 Cal., 406; *Khadem v. Emdad* (1901), 5 C. W. N., 617; but see *Boloram v. Ramchandra* (1895), 23 Cal., 279.

Equitable mortgage of personal property.—Where the relationship between the plaintiff and defendant is that of equitable mortgagee and mortgagor, and not that of pledgee and pledgor, an order for foreclosure may be made. *Harold v. Plenty* (1901), W. N., 119.

3. (1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

Final decree in foreclosure suit.

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,

(b) ordering him to re-transfer the mortgaged property as directed in the said decree, and, also if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property :

Power to
enlarge time.

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment.

Discharge of
debt.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

Payment of
debt.

Where, &c., the defendant pays into court, &c.—This provision is more precise than that of section 87 of the Transfer of Property Act now repealed, since a decree for redemption would be made on payment of the amount declared due and subsequent costs into court, the mortgagor on redemption being entitled not merely to possession but also to the delivery of the title-deeds as well as a formal re-transfer by the mortgagee if so required. In England, in an action of foreclosure, where the mortgagee had lost the title-deeds, payment of the mortgage-money within a limited time was decreed, and, on payment of the same, a reconveyance was directed, with a bond of indemnity. *Shelmardine v. Harrop* (1821), 6 Madd., 39 ; cf. *Stokoe v. Robson* (1815), 19 Ves., 385 ; see also *Hornby v. Matcham*, (1848), 16 Sim., 325, where the mortgagee was ordered not only to procure fresh attested copies, but to make compensation which was to be deducted from the mortgage-debt. See also the notes to rule 7, *post*.

Final decree
when made.

Where such payment is not so made, &c.—As to whether notice of such application was necessary to be given under the repealed section 87 of the T. P. Act, to the mortgagor, see *Tara Pado v. Kamini* (1901), 29 Cal., 644 ; *Chaitram v. Daolat* (1893), 9 C. P. L. R., 5 ; but see *Venkatta v. Papayya* (1897), 8 M. L. J., 205. Cf. *Pandu v. Juje* (1903), 27 Mad., 40 ; *Bibi Tasliman v. Harihar* (1904), 32 Cal., 253. Under the present rule it seems it would be necessary to hear the defendant before making a final decree. See Form No. 10, Sch. 1, App. D., Civil P. Code, *post*. In England the order absolute is obtained as of course on motion. *W. N.* (1883), p. 40 ; Fisher, sec. 205 ;

Notice if
necessary.

see also p. 602, *ante*. Whether the mortgagor can redeem as of right at any time before an order absolute has been made is a question left in considerable obscurity by the case-law on the subject. See the cases cited in note 2, p. 600, *ante*. See also *Alimea v. Roshun* (1905), 3 C. L. J., 533. Cf. *Ladu v. Babaji* (1883), 7 Bom., 532. It is, however, clear that the mere pendency of an appeal against a preliminary decree will not prevent the court which passed such decree from making it absolute. *Madan v. Ram* (1893), 1 C. W. N., 197. Time will run from the date of the decree of the first court although an appeal is preferred which is afterwards dismissed. See p. 600, *ante*. See also *Faijuddi v. Asimuddi* (1907), 11 C. W. N., 679. Where in a suit for foreclosure a decree had been made with regard to certain parcels of the mortgaged property but the suit with regard to the other parcels was dismissed and the mortgagee preferred an appeal against the portion of the decree dismissing his claim, it was held that the mortgagee could not apply for an order absolute with regard to the parcels for which only a decree was made without giving up his appeal. He was bound to wait till the disposal of the appeal. *Sham v. Muhammad* (1905), 27 All., 501.

When a new day must be named for payment. See p. 602, *ante*; Fisher, sec. 1803; cf. *Welch v. National, &c., Co.* (1887), 55 L. T., 673; *Holt v. Beagle* (1887), 55 L. T., 592; *Allen v. Edwards* (1873), 42 L. J. Ch., 455. See also *Cheston v. Wells* (1893), 2 Ch., 151; cf. *Raoji v. Andu* (1886), Bom. P. J., 160, where the court directed that any money which might be recovered by the mortgagee under a judgment against the mortgagor personally for rent of the mortgaged land should be debited to the mortgagee in account, if recovered before the mortgage was foreclosed; otherwise the execution of the judgment should be stayed, unless the mortgagor desired to re-open the foreclosure. **Negotiating for payment of mortgage-debt.** Where in a suit of foreclosure, pending exceptions to the masters' report which are afterwards disallowed, and after the time fixed by the report for the payment of the money, the plaintiff negotiates with the defendant with respect to the payment of his debt, he cannot apply to have the mortgage foreclosed from the day originally given. *Grove v. Cooper* (1823), 1 L. J. (o.s.), Ch., 197. Where a decree was made on the application of a mortgagee before the expiration of the period allowed by a petition of compromise without drawing the attention of the court to its terms, the decree was set aside as fraudulent. *Baishnab v. Basunta* (1908), 13 C. W. N., 300.

Death of one of several mortgagees. A foreclosure was decreed, in default of payment, to three mortgagees, who were entitled "on a joint account." Before the day appointed for payment arrived,

Mortgagor can redeem up to what time.

When new date fixed.

Alteration due to negotiations.

Death of a mortgagee.

one of the mortgagees died. It was held that the foreclosure could not be made absolute, and the court appointed a new day for payment to the survivors. *Blackburn v. Caine* (1856), 22 Beav., 614. Cf. *Kingsford v. Poile* (1861), 8 W. R. (Eng.), 110; but see *Browell v. Pledge* (1888), W. N., 166.

Limitation for
application
under this
rule.

Time within which application should be made.—In the opinion of the Allahabad High Court, an application under section 89 of the Transfer of Property Act was subject to the limitation prescribed by Art. 179 of the Limitation Act, 1877. *Parmeshri v. Mohon* (1898), 20 All., 357; cf. *Ali Ahmad v. Naziran* (1902), 24 All., 542; *Kedar v. Lalji* (1889), 12 All., 61. See also the notes to rule 5, p. 958, *post*. In *Madhabmani v. Lambert* (1910), 37 Cal., 796; 12 C. L. J., 328, it has been held that Art. 181 of the Limitation Act, 1908, does not govern an application under O. 34, r. 3. See however *Amlook v. Sarat* (1911), 38 Cal., 913, in which a different opinion has been expressed by Jenkins, C.J. See also *Datto v. Shankar* (1913), 15 Bom. L. R., 841.

Enlargement
of time.

What is good cause within the meaning of the proviso.—See the judgment of Jessel, M. R., in *Campbell v. Holyland* (1877), 7 Ch. D., 166. Fisher, secs. 1958—1960. The conditions upon which the court will enlarge the time, will be probably the same as in England, *viz.*, payment within a limited time of the sum due for interest and costs and carrying on the account of subsequent interest and costs; the defendant being ordered to pay the costs of the application at once. Daniell's Chancery Practice, p. 1406. It must also be shown that the security is ample. *Nanny v. Edwards* (1827), 4 Russ., 124; *Eyre v. Hanson* (1840), 2 Beav., 478; *Jones v. Creswicke* (1839), 9 Sim., 304; *Booth v. Creswicke* (1840), Cr. & Ph., 361; *disting. Geldard v. Hornby* (1841), 1 Hare, 251, where the default had been occasioned by the act of the mortgagee. But if, for any special reason, the court enlarges the time in an action of foreclosure without ordering any immediate payment, subsequent interest is computed on the aggregate amount of principal, interest and costs. *Whallon v. Cradock* (1836), 1 Keen, 267; *Brewin v. Austin* (1838), 2 Keen, 211. Where in a foreclosure-action a mortgagee had obtained a foreclosure order *nisi*, and subsequently a judgment-creditor in another action who had obtained the appointment of a receiver by way of equitable execution of the property of the mortgagor, applied to be added as a defendant to the foreclosure-action, and that the period for redemption might be extended, the court made an order adding the applicant as defendant but refused to extend the time. *In re Parbola* (1909), 2 Ch., 437. This proviso, however, regarding the power of the court to postpone the date of payment does not give the court inherent jurisdiction to stay

No inherent
jurisdiction
to stay
proceedings.

proceedings where an application was made by a third party who sought to establish his right to redeem the mortgaged properties in a separate suit. *Akshya v. Surja* (1902), 6 C. W. N., 654. If, however, the time has to be enlarged owing to the neglect of the mortgagee to proceed under the decree, the court will refuse to allow him interest subsequent to the original day named for payment. See the cases cited in Belchambers, p. 339. In this connection, it may be noticed that where a puisne mortgagee has been foreclosed, subsequent interest against the mortgagor is computed on the whole sum, including prior interest and costs, payable by the foreclosed mortgagee. *Elton v. Curties* (1881), 19 Ch. D., 49; *Bickham v. Cross* (1752), 2 Ves., S. 471. **Appeal.** An order granting or refusing an extension of time was appealable under the Code of 1882 (1887), 9 All., 502, note. *Rahima v. Nepal* (1892), 14 All., 520. See also *Nandram v. Babaji* (1897), 22 Bom., 771; *Rango v. Bhomshetti* (1901), 26 Bom., 121; *Ishwar v. Gopal* (1903), 28 Bom., 102. Now under the Code of 1908, Order 43, rule 1 (o), only an order refusing to extend the time is appealable. But there is no appeal from a merely ministerial order, where the court does not exercise any judicial discretion. *Hulas v. Pirthi* (1887), 9 All., 501.

Where mortgagee neglects to proceed.

Appeal from order refusing to extend time.

If necessary ordering the defendant to put the plaintiff in possession.—See p. 593, *ante*. For the practice in England see, in addition to the cases cited in note 4, p. 593, *ante*, *Best v. Applegate* (1887), 37 Ch. D., 42; *Thynne v. Sarl* (1891), 2 Ch., 79. But the mortgagee is not precluded from bringing ejectment against the mortgagor after a decree for foreclosure which gives him for the first time an absolute title to the property. *Pugh v. Heath* (1882), 7 App. Cas., 235. It may be noticed here that a mere decree for possession will not operate as foreclosure in favour of the mortgagee; though the account taken by the court cannot be disturbed by the mortgagor. *Dattatrya v. Aumaji* (1886), Bom. P. J., 237.

On the passing of a decree, &c., the debt, &c., shall be deemed to be discharged.—The decree for foreclosure does not relate back to the judgment for an account, the security being converted into land only from the date of the order absolute. See pp. 71, 602, *ante*; cf. *Anwar-ul-Haq v. Jwala* (1898), 20 All., 358; *Rahai v. Ghasita* (1898), 20 All., 375. See also p. 619, *ante*, on the question whether the order will operate as a discharge of the costs. The action is at an end as soon as the decree becomes absolute. *Wills v. Luff* (1888), 38 Ch. D., 197.

Discharge of debts.

Appeal.—In the opinion of the Allahabad High Court an order under the repealed section 87 of the Transfer of Property Act was an

order in execution of the substantive foreclosure-decree, and so appealable as a decree under sec. 244, read with sec. 2 of the Civil Procedure Code (1882). *Kedar v. Lalji* (1889), 12 All., 61.

Preliminary
decree in suit
for sale.

4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clauses (a), (b) and (c) of rule 2 and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

Power to
decree sale in
foreclosure-
suit.

(2) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

This rule corresponds with the repealed section 88 of the Transfer of Property Act.

Decree for
sale.

In a suit for sale, &c.—There can be no decree for sale for non-payment of interest when the mortgagee is entitled to the rents and profits in lieu of it, if he does not choose to take possession. *Mohadaji v. Joti* (1892), Bom. P. J., 230; cf. *Bansidhor v. Hadi* (1892), 9 A. W. N., 177. It was held in one case by the Allahabad High Court that a sub-mortgagee is not entitled to bring any suit under this section. *Ganga v. Chunni* (1895), 18 All., 113. In this case, the learned Chief Justice Sir John Edge observed, that it was inconceivable to him how any subordinate judge could have given the plaintiff a decree for sale of property which was not mortgaged to him; but see the cases cited in note 3, p. 264, ante; and *Zaki v. Deo* (1909), 10 C. L. J., 470; disting. *Padgaya v. Baji* (1895), 20 Bom., 549. **Whether a**

Right of sub-
mortgagee.

puisne mortgagee can sell without redeeming a prior mortgage. See pp. 623, 624, *ante*; and cf. *Toome v. Hamilton* (1831), 5 L. R. N. S., 189; *Crofts v. Poe* (1834), 1 Jones, 540. See also *Lawless v. Mansfield* (1841), 4 Ir. Eq., 114. The rule laid down in the earlier Allahabad cases that where a puisne mortgagee asks for a sale without offering to redeem all prior incumbrancers on the property, the only way to deal with the suit is to dismiss it, seems to have been relaxed in later cases. See *Kali v. Ahmad* (1894), 17 All., 48; *Mahammad v. Ghaffar* (1899), 21 All., 272. See also *Parmanand v. Daulat* (1902), 24 All., 549. The Allahabad Court however held that there could be no objection to a decree for sale "subject to a charge" for maintenance. *Lalman v. Mohar* (1906), 29 All., 205; 3 A. L. J., 448. It is not necessary that a decree in a mortgage-suit should in terms reserve rights admitted by all the parties and sec. 96 of the Transfer of Property Act (now o. 34, r. 12) does not militate against that view. *Srinivasa v. Yamuna* (1905), 29 Mad., 84. **Succession Certificate Act.** See the cases cited at pp. 68, 69, *ante*. It may also be remarked that it has been the practice on the original side of the Calcutta High Court to treat ordinary mortgage-suits as suits for liquidated claims; the claim of the plaintiff being in substance a claim for a liquidated demand for money. *Benode v. Bussanta* (1900), 27 Cal., 355[a]. And a certificate is certainly not necessary, where the money claimed in the action was no part of the estate of the deceased at the time of his death. *Ranchordas v. Bhagabhan* (1893), 18 Bom., 394. Nor where the debt is due to a joint Mitakshara family though the security stood only in the name of a deceased member of the family. *Subramanian v. Rakku* (1891), 20 Mad., 232, explaining *Venkata v. Venkayya* (1890), 14 Mad., 377. **Accounts.** An account should be taken in the same way as in an action for foreclosure; and if there is an equity in favour of the mortgagor entitling him to have a general account taken, he is bound to set it up, and cannot insist on it in a fresh action. *Mahabir v. Macnaghten* (1889), 16 I. A., 107; 16 Cal., 682.

Right of
puisne mort-
gagee for
order for sale.

Whether
succession
certificate
necessary.

Form of decree.—See rule 13 of the rules prescribed by the High Court of Bengal. Form No. 4, Appendix D, Sch. I of the Code of Civil Procedure gives a form in a simple case of one mortgage. This however must be modified according to the circumstances of each case. Forms No. 7, 8, 9 provide for cases where there are more than one mortgage or a sub-mortgage. A combined decree under sections 88 and 90 of the Transfer of Property Act was held to be contrary to the procedure

Forms of
decree.

[a] Messrs. Philips and Trevelyan are of opinion that the Calcutta deci-

sions are erroneous. Hindu Will, pp. 342, 343.

Form of
decree in case
of several
mortgages.

Construction
of decree.

Computation
of interest.

prescribed by that Act. *Chandi v. Ambika* (1904), 31 Cal., 792. For form of judgment in debenture-holder's action, see *Rice v. Noakes & Co.* (1899), W. N., 229. In a suit brought by the puisne mortgagee to which the prior mortgagee who has also become the owner of the equity of redemption is made a party, the decree must direct the redemption by the second mortgagee and then for sale, if the prior mortgagee as owner of the equity of redemption does not redeem the second mortgage. *Venkataramana v. Gompertz* (1908), 31 Mad., 425; 18 M. L. J., 298. Where the decree made no provision for redemption by a puisne mortgagee, but only mentioned the mortgagors, and the property was sold in execution and purchased by the decreeholder mortgagee, the puisne mortgagee was allowed a period for redemption in a suit on his own mortgage. *Mahabir v. Prabhu* (1908), 9 C. L. J., 78. Where the terms of a decree are ambiguous, it should be so construed as to make it accord with law rather than to make the decree conflict with it. *Bakar v. Udit* (1899), 21 All., 361. See also *Maharaja of Bharatpur v. Rani Kanno* (1900), 28 I. A., 35; 23 All., 181; 5 C. W. N., 137. Where the High Court by its decree directed a district court to take an account of the amount due to a decreeholder under a mortgage, which court took the account accordingly and passed an order declaring the amount so due under section 88 of the Transfer of Property Act, it was held that the order was one falling under section 244(c) of the Civil Procedure Code of 1882. *Aryan Bank v. Kamma* (1902), 26 Mad., 237. **Computation of interest.** See p. 507, *ante*; See also *Balwant v. Amolak* (1905), 28 All., 223, and the cases under O. 34, r. 2, p. 939, *ante*; and the remarks on the case of *Maharajah of Bhartpur v. Rani Kanno*, *supra*, in 11 M. L. J., p. 111. The language of their Lordships of the Privy Council can, however, hardly be said to be ambiguous; as they clearly approve of the received practice both in Calcutta and in Madras and their concurrence with the ultimate decision of the Allahabad High Court can only mean agreement with that judgment in so far as it overruled the decision in *Amolak Ram's case*; and it was certainly not necessary for the Judicial Committee to decide at what rate subsequent interest should be allowed. It is also permissible to point out that apart from authority there is no reason whatever for making any distinction between a mortgage-decree which has become absolute and an ordinary decree for money. In both cases, the rights of the parties under the contract become merged in the judgment, and there is no more reason for giving interest at the contractual rate in the one case than there is in the other. *Commercial Bank of India v. Atendrilayya* (1900), 23 Mad., 637; but see *Manoo v. Durga* (1901), 5 C. W. N., 653; cf. *Krishnaswamy v. Srinivasa* (1900), 11 M. L. J., 7. The question, however, has now been set at

rest; see *Sunder v. Sham* (1906), 34, I. A. 9; 34 Cal., 150, affg. *Rameswar v. Sham* (1901), 29 Cal., 43; *Brojo v. Tara* (1905), 3 C. L. J., 188. **Compound interest.** In England a distinction has been taken between a case of foreclosure and a decree for sale and payment of incumbrances according to their priority. In the latter case, if there is no surplus, subsequent interest will be calculated only on the principal; and a similar rule is observed where a mortgagee asks for payment in an administration-suit in which the mortgaged estate has been sold. *Watton v. Cradock* (1835), 1 Keen, 267; *Brewin v. Austin* (1838), 2 Keen, 211; cf. *Harris v. Harris* (1759), 3 Atk., 722.

Directing that in default of the defendant paying, &c.—A decree under this rule is substantially a decree *nisi* and cannot be enforced till it is made absolute under the next rule. See *Ram Lal v. Narain* (1890), 12 All., 539; but see *Phulchand v. Nursingh* (1899), 28 Cal., 73; disting. *Siva Persad v. Nundo* (1890), 18 Cal., 139; *Subrahmanyam v. Narayana* (1899), 9 M. L. J., 349; *Baldeo v. Abhiman* (1895), 12 C. P. L. R., 103. And it makes no difference that the decree is a consent-decree or is founded on an award of arbitrators appointed by the parties. *Bhagawan v. Ganu* (1899), 23 Bom., 644; *Tara Prosad v. Bhobodeb* (1895), 22 Cal., 931. But where the judgment-debtor was aware of the intended sale but did not object in time, the court refused to set aside the sale specially as there was no allegation of damage. *Rayilu v. Narayana* (1899), 10 M. L. J., 205.

Decree must be made absolute.

The proceeds of the sale, &c., be paid into Court.—Where the purchase-money was invested at the instance of the mortgagee in consols without objection on the part of the personal representative of the mortgagor; but when again converted into money was insufficient to satisfy the plaintiff's claim (owing to a fall in the price of stock), it was held, the plaintiff was entitled to come in and prove for the deficiency in a suit to administer the mortgagor's estate. *Tompsett v. Wickens* (1855), 3 Sm. & Giff., 171. **The balance, if any, be paid to the defendant or other persons, &c.** See p. 605, ante. See also *Jackson v. Curtis* (1820), 2 Mall., 466. In Ireland it is the established practice to allow puisne mortgagees to prove in respect of their securities, so that they may come upon the residue after payment of the plaintiff. *Davis v. Rowan* (1842), 3 Dr. & War., 478. Disting. *Ellis v. Molloy* (1829), 1 Moll., 536. For form of judgment where a sale is directed at the request of incumbrancers in England, see Seton, pp. 1912, 1913. See also *Bingham v. King* (1867), 14 W. R. (Eng.), 414. **Where proceeds of different properties in mortgage should be distinguished.** A sale of mortgaged property, consisting of freehold and leasehold premises, and

Disposal of sale-proceeds.

a policy of life-insurance, was ordered in a foreclosure-suit, at the request of the mortgagee. The mortgagors were bankrupt, and the suit was against their assignees and against incumbrancers subsequent to the plaintiff. The decree directed accounts of what was due to the several incumbrancers, and directed the proceeds of the different properties to be distinguished. *Cator v. Reeves* (1852), 16 Jur., 1004.

Decree for sale
in foreclosure-
action.

In a suit for foreclosure if the plaintiff succeeds, &c.—

Cf. sec. 25 (2), Conveyancing Act, 1881. But the words “ notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage-money ” have not been reproduced in this rule. It may however be noticed that it is not the practice in England to order a sale upon the application of the mortgagee without allowing a certain time for redemption. And the court will not order an immediate sale unless under special circumstances. *Green v. Biggs* (1885), 52 L. T. N. S., 680 ; *Wade v. Wilson* (1882), 22 Ch. D., 235 ; *Green v. Biggs* (1855), W. N., p. 128 ; *Jones v. Harris* (1887), W. N., p. 10. It seems that a sale may be ordered on the application for final foreclosure. *Weston v. Davidson* (1882), W. N., 28. See p. 604, *ante*. And in one case a sale was directed after a decree for foreclosure but before it was drawn up. *Woodford v. Brooking* (1874), L. R., 17 Eq., 425. But the court must be in a position to complete the sale by delivering possession and handing over the title-deeds to the purchaser. Nor will the court exercise the discretion when the mortgagor has had no notice of the intention to apply for a sale. *South-Western District Bank v. Turner* (1884), 31 W. R. (Eng.), 113. Cf. *Mears v. Best* (1853), 10 Hare, li ; *Siffkin v. Davis* (1854), Kay, XXI ; *Smith v. Robinson* (1853), 1 Sm. & G., 140 ; *Newman v. Selfe* (1864), 33 Beav., 522 ; *Green v. Biggs* (1885), 52 L. T. N. S., 680. The court will also refuse to order a sale at the request of second mortgagees and mortgagors, where the value of the estate is insufficient to cover what was due on the first mortgage. *Merchant Banking Co. v. London, &c., Bank* (1886), 55 L. J. Ch., 479. Where defendant mortgagor did not appear, and the second mortgagee made default in pleading, a sale of only so much of the property as should be necessary to satisfy what was due on plaintiff's mortgage, was directed. *Wade v. Wilson* (1882), 22 Ch. D., 235 ; and see *York Union Banking Co. v. Arlley* (1879), 11 Ch. D., 205. **Conduct and mode of sale.** The conduct of the sale may properly be given to the person most interested in obtaining the largest possible price for the property. *Davis v. Wright* (1886), 32 Ch. D., 220 ; *Hewitt v. Nanson* (1859), 28 L. J. Ch., 49. But there is no general rule that the conduct of the sale should be given to a subsequent incumbrancer or the owner of

Notice to
mortgagor
necessary.

the equity of redemption. *Christy v. Van Tromp* (1886), W. N., 111. **Security for costs.** See *Weston v. Davidson* (1882), W. N., 28; *Davies v. Wright* (1886), 32 Ch. D., 220; distinguishing *Wooley v. Colman* (1882), 21 Ch. D., 169. See also *Whitbread v. Roberts* (1859), 28 L. J. Ch., 31; *Manchester, &c., Bk. v. Scrowcroft* (1871), 27 Sol. Journ., 517.

5. (1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,

(b) ordering him to retransfer the mortgaged property as directed in the said decree, and also, if necessary;

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4.

This rule generally agrees with the repealed section 89 of the Transfer of Property Act. Under this rule the defendant cannot apply for a final decree for sale and the provision about payment to the plaintiff has been omitted. The last clause of sec. 89 has also been omitted. When the defendant makes the payment required, a decree for redemption will be made as of course. The rule only provides for a case where there is a single mortgage and the proceedings are between the mortgagee and the mortgagor only.

Where on or before the day fixed.—Neither the provisions of rule 4, nor of rule 5 apply to the case of a mortgage-decree by consent by which the decretal amount is payable by instalments. *Abir v. Jahar* (1907), 6 C. L. J., 95; *Bechu v. Bicharam* (1909), 10 C. L. J., 91; *Biswanath v. Bhagwandin* (1911), 14 C. L. J., 648.

Final decree
in suit for
sale.

Consent de-
crees not in-
cluded.

Amount payable under the final decree.

The amount declared due as aforesaid, &c.—It was held under the repealed section that if future interest had been allowed under sec. 88 of the Transfer of Property Act, it was not necessary that specific mention of it should be contained in the order absolute for sale. *Rajcoomar v. Bisheshar* (1894), 16 All., 270. On the other hand, a final decree for sale cannot add to the liability of the judgment-debtor except with regard to any additional costs under rule 10. *Kashi v. Sheo* (1896), 19 All., 186; though if it does so erroneously, it will become final and conclusive, unless it is set aside in the usual way either on appeal or review of judgment. *Pribhu v. Rupsing* (1898), 20 All., 397.

Procedure where amount is not paid.

The court shall, &c., pass a decree, &c.—It was held in a suit for sale instituted under the Transfer of Property Act by a first mortgagee against the mortgagor and a second mortgagee who was made a party defendant under the provisions of section 85 of the Act, that the mortgagor could not be called upon to redeem not merely the first mortgage but also the second mortgage. The liability to have the property sold only arises upon failure to pay to the plaintiff mortgagee the amount found due to him. *Mackintosh v. Watkins* (1904), 1 C. L. J., 31. The pendency of an appeal against a decree *nisi* is in itself no ground for refusing to make an order absolute, and the court has no power, of its own motion to extend the time fixed for payment. *Ram Golam v. Barsati* (1902), 10 C. W. N., 910. It was held in Allahabad that an order absolute for sale need not necessarily be made by the court which passed the decree *nisi*. *Oudh Behari v. Nageshar* (1890), 13 All., 278. It is clear that the property cannot be sold before the time fixed by the court under rule 4. *Hardayal v. Chadamila* (1884), 7 All., 194. On an application being made under the repealed section 89, it was held that the court could not make an order for taking an account in order to ascertain whether the decree had been satisfied, if it appeared that the mortgagee was in possession of the mortgaged property from the date of the preliminary decree which was passed on compromise. *Appa v. Krishna* (1901), 25 Mad., 537. Cf. *Nistarini v. Kazim* (1910), 12 C. L. J., 65. The function of the court in drawing up a decree absolute was held to be more or less ministerial, and so where the decree *nisi* made no provision for payment of interest subsequent to the day fixed for payment it was not open to the court to allow any such interest in making the decree absolute under section 89 of the Transfer of Property Act. *Moha Prasad v. Ramani* (1906), 13 C. W. N., 744. When a conditional decree for sale was made in favour of two joint decreeholders under sec. 88 of the Transfer of Property Act, the heirs of one of the decreeholders on his death were held entitled to apply for a decree for sale under this

Function of court in drawing up final decree.

rule, after the repeal of sec. 89 of the Act, in favour of themselves and the other decreeholder, although the latter did not join in such application. The right to do so was inherent in the decree obtained under sec. 88 of the Transfer of Property Act and was not affected by the subsequent repeal of sec. 89. *Ganga v. Banwari* (1911), 34 All., 72; 8 A. L. J., 1229. Cf. *Tamman v. Lachhim* (1904), 26 All., 318. It was held that it was not necessary to give any notice of an application under the repealed section 89 to the mortgagor before an order absolute for sale. *Krishna v. Muthusami* (1901), 25 Mad., 506; *Mahomed v. Thomas* (1906), 4 C. L. J., 317. Cf. *Ram Jas v. Sheo* (1905), 28 All., 193. The validity of an order directing a sale of the mortgaged premises cannot be questioned by the mortgagor on the ground that such property is inalienable by law. *Madho v. Katwari* (1887), 10 All., 130. Nor can a sale be resisted by the legal representative of the mortgagor on the ground that the mortgaged property belongs to himself. See p. 596, *ante*. For the meaning of a part of the mortgaged property, see the notes to sec. 69, *supra*. See p. 605, *ante*. Where an order absolute for sale was made with regard to a part of the property, another application might be made as to the rest if upon a sale, the proceeds proved insufficient to pay off the decree. *Balkrishanji v. Mitter* (1902), 25 All., 212; cf. *Sat Narain v. Radha* (1903), 25 All., 264. The court has no discretion to enlarge the time for payment. *Tani Ram v. Gajanan* (1899), 24 Bom., 300. It may be here noticed that in England, no further orders are necessary except in actions of foreclosure. Seton, p. 1911. But it would seem that an immediate sale will not be ordered except upon consent. *Bethan v. Mitchell* (1843), 5 Ir. Eq., 218. One of two joint holders of a decree under sec. 88 of the Transfer of Property Act was held to be not entitled to certify satisfaction of the whole decree so as to bind the other, who was entitled to obtain an order absolute for sale in respect of his own share of the mortgage-debt. *Tamman v. Lachhmin* (1904), 26 All., 318. As to the right of a puisne mortgagee to apply for an order under the repealed sec. 89 of the Transfer of Property Act after payment of the amount found due to the prior mortgagee on his suit in which the puisne mortgagee was made a party, see *Jamna v. Misri* (1904), 26 All., 504. As to whether the court could take into consideration any payment by the mortgagor to the mortgagee or any adjustment of the decree after the preliminary decree on an application being made under sec. 89, having regard to sec. 258 of the Civil Procedure Code of 1882, see *Pramatha v. Khetra* (1902), 29 Cal., 651; *Hatem v. Abdul* (1903), 8 C. W. N., 102; *Hakim v. Ram* (1908), 30 All., 248; Cf. *Harish v. Jagabandhu* (1906), 7 C. L. J., 581; 12 C. W. N., 282; *Nistarini v. Kazim* (1910),

Whether notice to mortgagor necessary.

One of two joint decree-holders cannot enter satisfaction.

12 C. L. J., '65; *Hiranmoy v. Musa* (1910), 16 C. L. J., 169. The effect of the change has been that the provisions of the present Code of Civil Procedure apply to suits on mortgages and to the execution of mortgage-decrees generally except where any special exception has been made. Cf. *Sarat v. Nahapiet* (1910), 37 Cal. 907.

Limitation.

Limitation.—An application for an order absolute under the repealed section 89 of the Transfer of Property Act was held not to be governed by any article of the Limitation Act. *Ajudhia v. Baldeo* (1894), 21 Cal., 818; *Tiluck v. Parsotein* (1895), 22 Cal., 924; *Tara Prosad v. Bhobodeb* (1895), 22 Cal., 931; *Akikunnissa v. Roop Lal* (1897), 25 Cal., 133; *Pramatha v. Khetra* (1902), 29 Cal., 651; *Bechu v. Bicharam* (1909), 10 C. L. J., 91. *Bakatram v. Karpetji* (1903), 5 Bom. L. R., 540; *Ranbir v. Drigpal* (1893), 16 All., 23; *Mahabir v. Sital* (1897), 19 All., 520; *Dina Nath v. Iswar* (1899), 3 Cal. W. N., cccxxii; see also *Manekbai v. Manekji* (1880), 7 Bom., 213; but see *Chunni v. Harnam* (1898), 20 All., 302; *Oudh Behari v. Nageshar* (1890), 13 All., 278; *Bhagawan v. Ganu* (1899), 23 Bom., 644; *Baldeo v. Ibu* (1905), 27 All., 625; *Ali v. Naziran* (1902), 24 All., 542; *Ramayyad v. Kadir* (1907), 31 Mad., 68; *Hakim v. Ram* (1908), 30 All., 248; *Appiah v. Rami* (1906), 16 M. L. J., 503. See also p. 948, *ante*, as to whether Art. 181 of the Limitation Act is applicable.

The omission of the words “and thereupon the defendant’s right to redeem, &c.” which occurred in the repealed section 89, Transfer of Property Act, makes it clear that the mortgagor is not precluded from redeeming his estate at any time before it has been actually sold. See *Behari v. Ganpat* (1887), 10 All., 1; *Raja Ram v. Chunni* (1897), 19 All., 205; *Harjas v. Rameshar* (1898), 20 All., 354; *Prem Chand v. Purnima* (1888), 15 Cal., 546; *Bibijan v. Sachi* (1904), 31 Cal., 863; *Misri v. Mitthu* (1905), 28 All., 28; *Adipuram v. Gopalasami* (1907), 31 Mad., 354; *disting. Khetter v. Faizuddin* (1897), 24 Cal., 682.

Appeal.—An appeal from an order refusing an application by the mortgagee under the repealed section 89 of the Transfer of Property Act was held to be an appeal from a decree within the meaning of sec. 2 of the Code of Civil Procedure. *Srikanta v. Yessuddin* (1897), 1 C. W. N., coix. But there was a divergence of opinion as to whether a question arising as to the order absolute for sale was one relating to the execution of the decree within the meaning of sec. 244 of Code of Civil Procedure. *Akikunnissa v. Roop Lal* (1897), 25 Cal., 133; following *Ajudhia v. Baldeo* (1894), 21 Cal., 818 (823); *Tiluck v. Parsotein* (1895), 22 Cal., 924; *Tara v. Bhobodeb* (1895), 22 Cal., 931 (934); *Ranbir v. Drigpal* (1893), 16 All., 23; dissenting

from *Kedar v. Lalji* (1890), 12 All., 61; *Oudh Behari v. Nageshar* (1891), 13 All., 278. Now a decree for sale is passed under this rule.

Succession Certificate Act.—Section 4 is not a bar to further proceedings at the instance of the representative of the mortgagee, upon the death of the latter during the pendency of the execution-proceedings. *Muhammad Yusuf v. Abdur Rahim* (1899), 26 Cal., 839; 4 C. W. N., 558; *Nanchand v. Yenawa* (1904), 28 Bom., 630.

Jurisdiction to sell.—A court has no jurisdiction to sell property over which it had no territorial jurisdiction at the time it made the order for sale. *Premchand v. Mokhoda* (1890), 17 Cal., 699. But where the property is only in part within the jurisdiction of another court, the jurisdiction of the court in which the suit was instituted to sell the whole property is not ousted. *Maseyk v. Steel & Co.* (1887), 14 Cal., 661; *Gopy v. Doybaki* (1895), 19 Cal., 13; *Tincouri v. Shib* (1894), 21 Cal., 639; cf. *Jugernath v. Dip Rani* (1895), 22 Cal., 871, decided under Act XII of 1887; see also *Bachu v. Golab* (1899), 27 Cal., 272; *Dakina v. Bilash* (1891), 18 Cal., 526. Jurisdiction of court to sell property.

Conduct of sale.—The court will not ordinarily direct a sale by the receiver pending an administration-suit. *Netai v. Ashutosh* (1901), 5 C. W. N., 408. Conduct of sale.

It would appear that the court has in the exercise of its discretion the power to direct in what order the several items of the mortgaged properties should be sold. *Mahomed v. Saudagar* (1910), 15 C. W. N., 80; *Krishna v. Muthukumara Sawmiya* (1905), 29 Mad., 217; *Kommineri v. Mangala* (1907), 31 Mad., 419; *Subraya v. Ganpa* (1911), 35 Bom., 395; cf. *Ram v. Mohesh* (1882), 9 Cal., 406; but see *Krishna v. Bhairab* (1905), 32 Cal., 1077; 9 C. W. N., 868; *Mohunt v. Sattar* (1906), 11 C. W. N., XXVII; *Amir v. Bukshi* (1906), 34 Cal., 13; 4 C. L. J., 573; in which it was also held that if any question of contribution arises on account of the mortgagee himself having purchased some of the mortgaged properties, it must be tried in a separate suit and not in execution-proceedings. Order of sale.

What passes under a sale in an imperfectly constituted suit.—See pp. 620—624, *ante*; see also *Narbharam v. Mithia* (1893), Bom. P. J., 59; *Sheo Pershad v. Tiluk* (1901), 5 C. W. N., 232; *Dhondhai v. Suleemooddeen* (1874), 24 W. R., 359; *Sahai v. Sham* (1879), 2 All., 142; *Muhammad v. Abdulla* (1900), 24 Mad., 171; 10 M. L. J., 347; *Kudratullah v. Kubra* (1900), 23 All., 25; *Dhapi v. Barham* (1899), 4 C. W. N., 297. In Ireland where a sale gives the purchaser the same title that a foreclosure does in England, an absent party can only redeem the purchaser. *Ormsley v. Thorpe* (1808), 2 Moll., 503; cf. *Anundoo v. Dhonendro* (1871), 14 M. I. A., 101, 109. But this rule Sale in an imperfectly constituted suit.

Unauthorized
sales.

has not been generally followed here. Thus in a Calcutta case, it was held that where a minor is not properly represented, he is not bound to redeem the purchaser, but may bring ejectment. *Bankey v. Walihun* (1899), 3 C. W. N., cccxl. **Price of redemption.** See pp. 625—627, *ante*. **Unauthorized Sales.** Where after a decree for sale, an order was passed with the consent of the mortgagee that a certain parcel of land in the hands of one of the judgment-debtors should be sold last, it was held that the order was binding upon the assignee of the decree and that a sale in contravention of the terms of the order was invalid, and should be set aside. *Subbaraya v. Srinivasa* (1900), 10 M. L. J., 211. Where the decree directed the sale of the property in the plaint mentioned, which however included certain property not comprised in the mortgage-deed, it was held that the order absolute, which was at variance with the terms of the preliminary decree, did not preclude the defendant from recovering the property which was not included in the security, notwithstanding the provisions of secs. 13 and 244 of the Code of Civil Procedure, 1882. *Ram v. Kondo* (1900), 22 All., 442. But where the sale is in conformity with the decree, the purchaser is not bound to look behind it. *Kamiulla v. Chandar* (1900), 22 All., 377; where the equity of redemption had been sold under a decree obtained by a second mortgagee which is not allowed in Allahabad. Cf. *Kudrat v. Kubra* (1900), 23 All., 25; *disting.* *Mehrbano v. Nadir* (1900), 22 All., 212. **Property in possession of Receiver.** Property though in the hands of a receiver may be sold without the leave of the court. *Jogendra v. Debendra* (1898), 26 Cal., 127; 3 C. W. N., 90; *disting.* *Hem v. Prankristo* (1876), 1 Cal., 403. **When estate may be resold.** See p. 593, *ante*; cf. *Chooramun v. Mahomed* (1882), 9 I. A., 21; *Turvil, Ex parte* (1833), 3 Deac. & C., 346. *Disting.* *Raghunath v. Balaji* (1888), 13 Bom., 45.

Rights ac-
quired by pur-
chasers.

Rights of purchasers.—The sale will carry with it, if it purports to be of all the interests of the mortgagor any enlargement of them which may have taken place since the order for sale; *Umes v. Zahur* (1889), 17 I. A., 201; 18 Cal., 164; cf. *Ajijuddin v. Budan* (1895), 18 Mad., 492; *Bhawani v. Mathura* (1912), 40 Cal., 89; 16 C. L. J., 606; 16 C. W. N., 985. It should be noticed that the title of a purchaser not a party to the suit cannot be affected by the subsequent reversal of the decree; *Mukhoda v. Gopal* (1899), 26 Cal., 734; 3 C. W. N., 766. It should also be stated here that according to the Calcutta High Court a sale under a decree, on a mortgage could not be set aside under sec. 310 A of the Code of Civil Procedure, 1882; *Kedar v. Kali* (1898), 25 Cal., 703; but see *Tirumal v. Dastaghiri* (1898), 22 Mad., 286; *Raja v. Chunni* (1897), 19 All., 205. It is hardly necessary to repeat that the purchaser will be entitled under

his purchase not only to the property as it originally stood, but also to everything which has since become a part of the mortgaged premises. Jones, sec. 1657. Crops actually growing on the land will also pass to the purchaser, and certainly where they have been raised by a mortgagee in possession at whose instance the land was sold without any express reservation. *Ramalinga v. Samiapa* (1889), 13 Mad., 15; cf. *Land Mortgage, &c., India v. Vishnu* (1878), 2 Bom., 670. But the purchaser cannot claim any crops which have been severed in due course before his title accrues. Jones, sec. 1658. In England a mortgagee is entitled to the growing crops and rents from the date of order for sale. *Exp. Bignold* (1833), 2 Dea., & B., 398; cf. *Exp. Barnes* (1838), 3 Dea., 223. He will, however, be entitled to recover all rents which fall due after his title has been perfected, though the tenants may have paid them in advance to the mortgagor, *De Nicholls v. Saunders* (1870), L. R., 5 C. P., 589; *Cook v. Guerra* (1872), L. R., 7 C. P., 132; see also Jones, sec. 1659. The purchaser can claim delivery of the title-deeds on payment of the purchase-money into court and before its distribution. *Fowler v. Scott* (1867), 25 L. T., 784. And the plaintiff should not be allowed to draw out the purchase-money until he has delivered the deed executed by all necessary parties, or in their default by the proper officer of the court to the purchaser. See *Farrell v. Irwin* (1806), 2 Moll., 511. An incumbrancer paid off by the proceeds of the sale under a decree is bound to join, if required, in the conveyance, but he is not obliged to assign his security to the purchaser. *Anon* (1808), 3 Moll., 505.

6. When the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount.

Recovery of
balance due
on mortgage.

This rule corresponds with the repealed sec. 90 of the Transfer of Property Act. For form of decree under this rule, see Form No. 11, Appdx. D., *post*.

When the net proceeds of any such sale, &c.—It was held in Allahabad that in order to make the remedy provided by the repealed sec. 90 available, it was necessary that the mortgaged property should have been sold under sec. 89 by the person applying for a further decree. *Badri v. Inayat* (1900), 22 All., 404; *Kamta v. Saiyed* (1900), 31 All., 373; 6 A. L. J., 451. See also *Ram Ranjan v. Indra* (1906), 33 Cal., 891; *Lakhi v. Kirtibas* (1913), 18 C. L. J., 133; *Surja v.*

Application
of the section
where made.

Whether mortgagee may release a portion of the property.

Pramada (1913), 17 C. W. N., 1039. But this literal construction was not adopted in *Matsulla v. Jan Mamud* (1900), 28 Cal., 12; 4 C. W. N., 735; dissenting from *Goluk v. Ram* (1899), 4 C. W. N., 268; but on a point which does not affect the true construction of the section. When, however, the decree was for sale of a portion of the mortgaged property an application might be made for a personal decree if the net proceeds of the sale of such portion were insufficient. *Sheo v. Behari* (1902), 25 All., 79; *Ghafur v. Muhammad* (1905), 28 All., 19; 2 A. L. J., 413. In the opinion of the Allahabad High Court a mortgagee is entitled to abandon his claim against any portion of the mortgaged property and apply for a personal decree for any balance due after giving credit for the amount realized by the sale of the property actually sold. *Pirbhu v. Amir* (1907), 29 All., 369; cf. *Kedar v. Chandu* (1903), 26 All., 25; distinguishing *Pirbhu v. Baldeo* (1906), 29 All., 260. See also *Gajadhar v. Alliance Bank* (1906), 28 All., 660; *Shiam v. Ganesh* (1906), 28 All., 674. But it has been held in Calcutta that the mortgagee cannot by releasing a portion of the mortgaged property impose a personal liability on the mortgagor to which otherwise he would not be subject. *Ram Ranjan v. Indra* (1906), 33 Cal., 890; 10 C. W. N., 862. As to whether notice should be given to the defendant before making a decree, see *Abdul v. Satya* (1908), 35 Cal., 767; 12 C. W. N., 145.

Whether rule applies to costs.

The amount due to the plaintiff.—It was suggested that the repealed section would not include costs payable to the mortgagee. And the language of the section perhaps lent some colour to the criticism. Macpherson, 699. But the practice has certainly been to treat costs as part of the amount due on the mortgage. See p. 619, *ante*. The order for costs is a part of the mortgage-decree and the decree-holder must proceed against the mortgaged properties in the first instance before he can execute the decree against the mortgagor personally. *Kamamma v. Komandur* (1907), 30 Mad., 464; *Rajkumar v. Sheo* (1908), 35 Cal., 431; 12 C. W. N., 364; 8 C. L. J., 152; cf. *Kushal v. Shrinivas* (1886), 2 C. P. L. R., 94; *Mukundlal v. Mangaljeet* (1897), 12 C. P. L. R., 78, 81. The amount due will also include costs subsequently incurred by the mortgagee. See rule 10, *post*. A puisne mortgagee paying off prior incumbrances is entitled to a decree under this rule for the deficit due upon the prior incumbrances as well as in respect of the deficit upon his own mortgage. *Ali Jan v. Mariam* (1903), 26 All., 93.

Balance legally recoverable.

If the balance is legally recoverable.—No decree can be made under this rule where the mortgagor is under no personal liability. Compare *Bunseedhur v. Sujant* (1889), 16 Cal., 540, with *Musahab*

v. Inayat-ul-lah (1892), 14 All., 513. But the mere fact that there is no express personal covenant to pay is no bar to the mortgagee obtaining a personal decree. *Parbati v. Gobinda* (1906), 4 C. L. J., 246; *Ram v. Surajdeo* (1908), 13 C. W. N., 138; 9 C. L. J., 5; *Jangi v. Chandar* (1908), 30 All., 388; 5 A. L. J., 670. But no such decree can be made against a purchaser of the mortgaged property even where he retains a part of the purchase-money undertaking to pay the amount to the mortgagee. *Jamna v. Ramautar* (1911), 39 I. A., 7; 34 All., 63; affmg., 31 All., 352; *Tara v. Brojo* (1912), 17 C. L. J., 120; 17 C. W. N. 457; nor against a puisne mortgagee; *Mata v. Sri* (1904), 26 All., 507; *Dalip v. Chait* (1912), 16 C. L. J., 394. Where a prior mortgagee in his suit prayed for an order for costs against a puisne mortgagee personally, but the decree under sec. 88 of the Transfer of Property Act did not contain such an order, the prior mortgagee was held not to be entitled to a decree under sec. 90 for the amount of the costs. *Ram v. Sil* (1901), 23 All., 439. As to the liability of a Mitakshara son to pay under a decree made under the repealed sec. 90, see *Ram v. Paswati* (1910), 11 C. L. J., 362. Whether the balance is legally recoverable or not is to be decided by the court upon evidence although the creditor had not asserted and proved the right in question in the suit, the right to a personal decree being given under certain circumstances. *Rama v. Sakharam* (1909), 11 Bom. L. R., 1127. Where the right to enforce such liability has been extinguished by the operation of the Statute of Limitations, regard being had to the time of the institution of the suit, and not to that of making an application under this rule, a decree cannot be made under it. *Malia v. Nachiappa* (1895), 5 M. L. J., 294; *Musaheb v. Inayatullah* (1892), *supra*; *Hamiduddin v. Kedar* (1898), 20 All., 386.; *Gulam v. Mahamadalli* (1910), 34 Bom., 540; cf. *Bageshri v. Muhammad* (1893), 15 All., 331. See also the remarks in 6 M. L. J., 485.

No decree can be made against puisne mortgagee or purchaser.

Where right barred by limitation.

When the Statute begins to run.—Where in an usufructuary mortgage, it was covenanted that if the mortgagee was not given possession, he should have a right to obtain the sale of the mortgaged property, the mortgage-debt meanwhile being payable on a certain specified date, it was held, the mortgaged property having proved insufficient to satisfy the debt, that limitation began to run from the breach of the covenant to pay on the due date and not from the breach of the covenant to put the mortgagee in possession. *Sheo Charan v. Lalji* (1896), 18 All., 371. In another case, where the borrower authorized the pledgee to sell the pledged property undertaking to pay any difference between the proceeds and the amount of the loan, it was held that the cause of action in respect of the whole

When time begins to run.

of the debt accrued, not when the securities were sold and the amount of the deficiency ascertained but when the debt became repayable. In such cases, the promise to pay the deficiency does not create a new obligation to pay; but the old obligation is merely transferred to a reduced sum. *In re McHenry* (1894), 3 Ch., 290. See also *Miller v. Runga* (1885), 12 Cal., 389; *Chattar v. Thakuri* (1898), 20 All., 512.

Decree for the balance. Order to be made in the same suit.

The court may pass a decree for such amount.—The order is to be made in the same suit, and it is not necessary for the mortgagee to bring a fresh action for the money. *Sonatun v. Ali* (1889), 16 Cal., 423; *Tirhini v. Hurruk* (1893), 21 Cal., 26; *Gopal v. Ali* (1888), 10 All., 632; *Raj Singh v. Parmandanda* (1889), 11 All., 486. A decree for sale directing that if the full amount of the debt is not realized from the proceeds, the balance is to be recovered from the mortgagor personally is not a decree in proper form. *Chandi v. Ambika* (1904), 31 Cal., 792; *Damodar v. Vyanku* (1906), 31 Bom., 244; 9 Bom. L. R., 199; *Lakhi v. Kirtibas* (1913), 18 C. L. J. 133. The court cannot refuse to make an order under this rule, simply because no provision is made for it in the decree for sale. *Sonatun v. Ali* (1889), 16 Cal., 423; *Musahed v. Inayatullah* (1892), 14 All., 513; *Malia v. Nachiappa* (1895), 5 M. L. J., 294. Nor is the mortgagee bound to run the risk of involving himself in litigation with third persons who are not parties to the suit, before he can apply for a personal decree against the mortgagor. *Shunmugu v. Ramanathan* (1894), 17 Mad., 309; 4 M. L. J., 91. The court is competent to decide the question of personal liability at the hearing of the suit, although a decree under this rule is not to be made until the occasion for it has arisen after it has been ascertained that the net proceeds of the sale are insufficient to pay the amount due on the decree. *Ram Ranjan v. Indra* (1906), 33 Cal., 890; *Uttam v. Ram* (1906), 28 All., 365; *Abbakki v. Krishnaya* (1909), 32 Mad., 534; *Lakhi v. Kirtibas* (1913), 18 C. L. J., 133. No such order is however necessary, if the original decree makes the mortgagor personally liable. *Lurga v. Bhagwat* (1891), 13 All., 356; *Batak v. Pitambar* (1891), 13 All., 360; *Lalji v. Barbar* (1893), 15 All., 334; *Dina v. Bejoy* (1903), 7 C. W. N., 744. See also the rules of the High Courts of Calcutta and Madras (notes to sec. 104, *ante*) under which a decree for sale must also contain an order to pay the deficiency, if any. But the mortgagee must, unless the decree which he has already obtained gives him the right to proceed against the mortgagor personally, apply under this rule for a decree for the balance. *Tirhini v. Hurruk* (1893), *supra*. Where, however, the mortgagor, notwithstanding service of notice upon him, raised no objection to the issue of execution on the ground that there was no decree under sec. 90 of the Transfer of Property Act in existence,

When it is necessary to apply.

it was held that he was estopped from raising such an objection upon a fresh application, and further that the order of the executing court which was also the court competent to make a decree under sec. 90 allowing execution against the other properties of the judgment-debtor was substantially a decree under sec. 90. *Madhu v. Kailash* (1897), 2 C. W. N., 254. In making a decree under this rule the court may direct the payment of the decretal amount in instalments under O. 20, r. 11 of the Civil Procedure Code. *Bibhu v. Sudhury* (1911), 15 C. W. N., 1083.

Limitation.—An application under this section must be made within the period prescribed by Art. 178 of the Limitation Act (now Art. 181). *Ram Sarup v. Ghaurani* (1899), 21 All., 453; cf. *Durga v. Bhagwant* (1890), A. W. N., 142. Cf. *Purna v. Radha* (1906), 33 Cal., 867; *Rahmat v. Abdul* (1907), 34 Cal., 672; 11 C. W. N., 674; 6 C. L. J., 119.

Operation of rule.—It will be noticed that the provisions of this rule are confined to sales under rule 5 and do not extend to sales under rule 8, though there is no apparent reason for the distinction. *Badri v. Inayat* (1900), 22 All., 404. But the right of the mortgagee to bring an action for his money where he is unable to recover the balance in a suit under rule 4, cannot be disputed. Rule operates on what sales.

As to whether the holder of a charge is like a mortgagee suing for sale, entitled to obtain a decree under this rule, see *Uttam v. Phulman* (1905), 28 All., 365; 2 A. L. J., 379.

Succession certificate.—Having regard to sec. 4 of the Succession Certificate Act, the court cannot pass a decree under this rule in favour of the representative of the mortgagee in the absence of a certificate under that Act. *Abdul v. Satya* (1908), 35 Cal., 767; 12 C. W. N., 145; 7 C. L. J., 68; *Nanchand v. Yenawa* (1904), 6 Bom. L. R., 585.

7. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree— Preliminary decree in redemption suit.

- (a) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

- (b) declaring the amount so due at the date of such decree,

and directing—

- (c) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those, under whom he claims, and shall, if necessary, put the plaintiff in possession of the property but
- (d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold.

This rule corresponds with the repealed sec. 92 of the Transfer of Property Act, the only difference being that the plaintiff must pay into court and the defendant is bound to re-transfer only if so required. For a form of decree under this rule see Form No. 5, Sch. I, Appendix D, of the Civil Procedure Code, *post*.

Action for redemption.

When an action for redemption may be brought.—See pp. 229—232, 610, *ante*, and the notes to sec. 60, T. P. Act, *supra*. Such an action should not be dismissed merely because the plaintiff's title was incomplete at the date of the suit. See p. 261, *ante*. But if the right to redeem is in a third person, a mere disclaimer by the latter of all interest, will not entitle the plaintiff to proceed with the suit. *Catley v. Simpson* (1863), 63 Beav., 551. The plaintiff has to prove the existence of a subsisting mortgage which he is entitled to redeem. *Musafer v. Lagan* (1905), 2 A. L. J., 62. See p. 614, *ante*. It may

be mentioned, in passing, that where a purchaser of the equity of redemption sues to redeem, the mortgagee cannot raise any question as to the adequacy of the consideration for the sale. *Kondo v. Gangadhar* (1888), Bom. P. J., 91. Where an usufructuary mortgagee acquired an interest after redemption which the mortgagor was entitled to treat as an accretion, it was held that the mortgagor is entitled to maintain different suits in respect of different parcels of land for which there are different causes of action, although he sets up an alternative claim common to all the different suits. *Ketki v. Dinabandhu* (1909), 10 C. L. J., 83. For the right of a sub-mortgagee to resist redemption until the original mortgage is redeemed, see *Keeran v. Narikote* (1891), 1 M. L. J., 485.

Pleadings.—Pp. 611—615, *ante*; for a form of plaint see Form Pleadings in No. 46, Appendix A, Sch. I, of the Civil Procedure Code, *post*; action for redemption. for an instance where in a suit of interpleader the plaint also contained in substance a claim for redemption, see *Jagannath v. Tulka* (1908), 32 Bom., 592. For a case in which the Judicial Committee allowed the plaintiff to redeem in an action for ejectment, when an alternative case was set up on appeal, see *Skinner v. Naunihal* (1913), 40 L. A., 105; 35 All., 211; 17 C. L. J., 555. Cf. *Govinda v. Ganu* (1876), Bom. P. J., 186; *Harding v. Tingey* (1864), 12 W. R. (Eng.), 684; *Hughes v. Cook* (1865), 34 Beav., 407; *disting. Jefferys v. Dickson* (1866), 1 Ch., 183; *Ramesur v. Dooleechand* (1873), 19 W. R., 422. In *Kadakamvalli v. Mekkath* (1907), 30 Mad., 388; 17 M. L. J., 329, it was held that in a suit for redemption if the plaintiff fails to prove the mortgage set up by him, the court may allow the plaintiff to redeem on the footing of a different mortgage set up by the defendant. As regards claims for overpayments. See p. 612, *ante*; and rule 9, *post*, p. 977.

Mode of objecting to mortgagee's claim for repairs and improvements.—In England where a mortgagor files a bill for Where claim for allowances disputed. redemption against a mortgagee in possession, who claims allowances for repairs and improvements, which the mortgagor objects to as being unnecessary and improper, he must raise such objection by the bill; otherwise the mortgagor will be only entitled to an ordinary decree allowing "necessary repairs and lasting improvements." *Powell v. Trotter* (1860), 1 Dr. & Sm., 388; *disting. Murphy v. Meade* (1835), 1 Jones, 620.

Putting in counter-claims where unnecessary.—When a Claim against co-defendant. question arises between a mortgagee and a sub-mortgagee who are co-defendants, it may be raised in England and, perhaps, also here, by a pleading which states both a defence as against the plaintiff and a

claim against a co-defendant, without the necessity of putting in a counter-claim. *Furness v. Booth* (1876), 4 Ch. D., 586, explaining *Shepherd v. Beane* (1876), 2 Ch. D., 223. It seems, also, that a mortgagee may set up an agreement by the mortgagor to convey to him the equity of redemption as a defence to an action for redemption. See p. 609, *ante*; cf. *Kanharan v. Uthoth* (1890), 13 Mad., 490; *Krishna v. Kesavan* (1897), 20 Mad., 305; but see *Ramaswami v. Chinnan* (1901), 11 M. L. J., 132; *disting. Howells v. Wilson* (1865), 34 Beav., 573, decided under the old practice. For the present practice in England see O. 19, r. 3, R. S. C.

Burden of proof.

Burden of proof.—(1) Where the mortgage is denied. See p. 614, *ante*. See also *Rama v. Baburao* (1874), Bom. P. J., 18; *Chinta v. Suga* (1886), Bom. P. J., 247; *disting. Chandra v. Bal* (1890), Bom. P. J., 14. The mortgagee, however, will be estopped from disputing the title of the mortgagor. See pp. 260, 261, *ante*; cf. *Roberts v. Clayton* (1796), 3 Anst., 715; *Motu v. Baliya* (1893), Bom. P. J., 145. (2) Where the plaintiff seeks to redeem a specific mortgage. P. 614, *ante*; and see *Hiru v. Bhikaji* (1888), Bom. P. J., 131; cf. *Patch v. Ward* (1862), 7 L. T., 413. **Interrogatories.** In all actions for redemption as well as foreclosure, it is relevant for the plaintiff to interrogate the defendant as to the dates of his securities, the amount of money which he has actually advanced and the rates of interest reserved. *Beavan v. Cork* (1863), 20 L. T., 689. See also the cases cited in note 4, p. 540, *ante*.

Mode of taking accounts.

Mode of taking accounts.—Pp. 615, 616, *ante*; and see the notes to rule 2, *ante*. The accounts should be taken before making any decree in the action. *Jamal v. Mohamedbhai* (1874), Bom. P. J., 7; cf. *Vithu v. Bala* (1893), Bom. P. J., 426; *Muthra v. Magh* (1870), 2 N.-W. P., 207; *Nellaya v. Vadakipat* (1880), 3 Mad., 382. The mortgagor cannot redeem without paying the amount due on his mortgage as admitted by him, though the mortgagee sets up a false defence. Bombay S. A., 66 of 1871, 14th August 1871. The price of redeeming the mortgaged premises is the same in a suit by the mortgagor to redeem as it would be in the like circumstances in a suit by the mortgagee to foreclose. *Du Viguer v. Lee* (1843), 2 Hare, 326. Where the mortgagor sought to redeem a puisne mortgagee who was in possession under an usufructuary mortgage and who had also redeemed a prior mortgage, it was held that the mortgagor was not entitled to a decree unless he offered to pay off the amount due under the prior mortgage together with the puisne mortgage. *Kirat v. Dobi* (1904), 27 All., 308. The second mortgagee on redeeming is bound to pay the full amount due on the first mortgage, although the first mort-

When bound to pay off prior mortgage.

gagee had sold his right for a smaller sum. *Venkataramana v. Gompertz* (1908), 31 Mad., 425; 18 M. L. J., 298. Similarly a subsequent mortgagee must pay the full amount due on the prior mortgage if he seeks to redeem the mortgage when the property has been purchased at an auction-sale held in execution of a decree obtained by the prior mortgagee without joining the subsequent mortgagee as party. *Phulmani v. Nageshar* (1911), 33 All., 370. For the construction of a decree directing an account of moneys laid out on improvement and management of the land, see *Kadir v. Nepean* (1898), 25 I. A., 241; 26 Cal., 1.

Accounting in
action for
redemption.

Right to tack unsecured debts against mortgagor or his assignee.—See pp. 225, 226, 253, 402—405, *ante*. See also *Ram Chandra v. Dhondi* (1890), Bom. P. J., 165. Where a mortgage-bond by one of its terms prevented the mortgagor from redeeming without first paying all arrears of rent, it was held in a suit brought by the assignee of the mortgagor that as he had notice of the original mortgage and therefore constructive notice of its contents, he must be deemed to have taken his assignment subject to the same liability as the original mortgagor. *Krishnaji v. Ganesh* (1893), Bom. P. J., 593. See also the notes to sec. 60, T. P. Act, *supra*.

Account of overpayments.—See pp. 564, 565, 612, *ante*. Where the action was founded upon a right to redeem but was not in proper form and the mortgagor was guilty of great laches, no account was directed of profits received before the institution of the suit as against purchasers for value without notice of any imperfection in their title. *Juggernath v. Shah Mahomed* (1874), 2 I. A., 48; 23 W. R. 99. For cases under the Deccan Agriculturist's Relief Act, see *Janoji v. Janoji* (1882), 7 Bom., 185; *Ram Chandra v. Janardan* (1882), 14 Bom., 19. See rule 9, *post*. **Apportionment of mortgage-debt.** Pp. 245—248, 607, 615, 616, 627, *ante*. See also *Anandrao v. Keshavrao* (1889), Bom. P. J., 170, where it was held that redemption may be claimed on payment only of a proportionate share of the mortgage-debt, unless the mortgagee is prepared to hand back the whole property. Cf. *Sheo Parshad v. Tiluk* (1900), 5 C. W. N., 232. *Rammony v. Premchand* (1901), 5 C. W. N., 423; *disting.* *Bhat v. Hira* (1888), Bom. P. J., 355; *Liladhar v. Virchand* (1887), Bom. P. J., 145. For a decree in a somewhat complicated case in which there were various mortgages and one of the mortgagees had also obtained a lease from the mortgagors, see *Vithoba v. Hanmant* (1894), Bom. P. J., 114. See also *Balkrishna v. Balvant* (1896), Bom. P. J., 791, in which it is also pointed out that though the mortgaged property may be inalienable, its profits should be taken into account as between mortgagor and mortgagee. But where a mortgagee in possession is evicted from a

When mort-
gage-debt may
be appor-
tioned.

portion of the mortgaged property by a person claiming under a title paramount to that of the mortgagor, a purchaser at an execution-sale of the mortgagor's right, title and interest in the remainder of the mortgaged property can only redeem on payment of the full amount due on the mortgage. (Bombay) S. A., 39 of 1870, 6th June 1871. **Period for which interest should be allowed.** There is no limit of time as regards the payment of interest in an action for redemption other than that contained in Article 148 of the Limitation Act. *Dandbhai v. Dandbhai* (1889), 14 Bom., 113. But it is doubtful whether the same rule will hold good where interest is recoverable only by way of damages. See pp. 505, 506, *ante*.

Form of
judgment.

Form of Judgment.—See pp. 616, 617, *ante*. It has been pointed out that the form of decree directed by the repealed section 92 of the Transfer of Property Act did not provide for cases in which, on the account being taken, nothing was found to be due to the defendant or the latter was found to have been over-paid. It has now been provided for by rule 9 *post*. See the common redemption judgment in Seton, p. 1926. If, in a suit for redemption against several successive mortgagees, the first mortgagee does not appear at the hearing, a subsequent mortgagee will be allowed to make the decree absolute against him. *Cottingham v. Shrewsbury* (1832), 5 Sim., 395. For form of decree where a tenant for life claims a charge for rents received by the mortgagee and directing redemption according to the priorities of the incumbrances and the rights of the parties taking under the plaintiff's testator's will; also as regards a derivative mortgage: see *Colyer v. Colyer* (1863), 3 DeG. J. & S., 676. **Where the property has been sub-mortgaged**, see p. 616, *ante*; cf. *Narayan v. Ganoji* (1891), 15 Bom., 692.

Directions
given in judg-
ment.

Shall deliver up to the plaintiff, &c., all documents, &c.—Where the mortgage is redeemed, the mortgagee will be bound to deliver up all the title-deeds to the mortgagor, including those that have been executed between the original mortgage and the final order for redemption. As to what deeds the mortgagee must return, see *Dobson v. Lund* (1851), 4 DeG. & S., 581; *Hudson v. Malcolm* (1862), 10 W. R. (Eng.), 720. A mortgagee when he is paid off has no right to keep a copy of any deed relating to the mortgaged property, not even a copy of the mortgage-deed. *In re Wade and Thomas* (1881), 17 Ch. D., 348. But when the mortgagee is a tenant-in-common of the mortgaged premises, he will be allowed to retain the deeds relating to the whole estate on giving a covenant for their production. *Yates v. Plumbs* (1854), 2 Sm. & G., 174.

Where title deeds not produced.—If the title-deeds cannot be produced, the mortgagee must not only pay the costs of the action,

but also compensation for the damage done to the estate, which may be set off against the mortgage-debt. He may also in addition be called upon to give the mortgagor a proper indemnity. See the notes to rule 3, *ante*. See however *Subbaraya v. Padmanabha* (1902), 12 M. L. J., 63, where it was said that in such a case the mortgagee could not be compelled to give security for the value of the property in execution of a decree for redemption, in the absence of an express provision in the decree to that effect. Where a mortgagee refused to hand over to the mortgagor then and there an indorsed reconveyance of the mortgaged property with the title-deeds, when a proper tender was made by the mortgagor, and an action for redemption was subsequently brought by the mortgagor, the court refused to allow the mortgagee interest and costs subsequent to the date of the tender and ordered him to pay the costs of the action. *Rourke v. Robinson* (1911), 1 Ch., 480. Cf. *Brown v. Sewell* (1853), 22 L. J. Ch., 1063; *Middleton v. Eliot* (1847), 15 Sim., 531; *Caldwell v. Mathews* (1890), 62 L. T., 799. *Luccraft v. Hite* (1785), 2 Hare, 14 n; *Schoole v. Sall* (1803), 1 Sch. & Lef., 176. For a recent case on the subject, see *James v. Rumsey* (1879), 11 Ch. D., 398, where it was also held that interest ceased to run from the day fixed for redemption under the notice to redeem. The form of the bond of indemnity in the case of lost title-deeds is given in *Shelmardine v. Harrop* (1821), 6 Madd., 39, 44.

Where mortgagee does not deliver title-deeds.

Re-transfer the property to the plaintiff, &c.—Where a person has only a partial interest in the equity of redemption, the mortgagee is bound to convey; but the conveyance should reserve the rights of the other persons interested. See p. 616, *ante*. For form of judgment carrying out equities between parties entitled to redeem, see Seton, p. 2076. The mortgagor is entitled on payment to be put into possession of the mortgaged properties and the obligation to do so is a continuing obligation on the mortgagee which cannot cease so long as the right of redemption is not barred. *Sivachidambara v. Kamtchi* (1909), 33 Mad., 71.

Right for reconveyance.

Costs of action for redemption.—Such costs are a part of the mortgage-debt, and if left unpaid, the mortgagee may claim to fore-close. *Subhana v. Krishna* (1891), 15 Bom., 644; (1892) Bom. P. J., 15. Ordinarily the redeeming party pays the costs, unless the mortgagee has been guilty of misconduct in resisting redemption; as for instance when he has been overpaid, or his conduct is otherwise against conscience. See p. 619, *ante*. According to Eve, J., the cases have established three propositions: (1) That a mortgagee has an absolute right to costs unless they are forfeited by misconduct; (2) that if the absolute right is forfeited by misconduct, the costs are in the discretion

Costs of the action.

Cost of redemption-action.

of the judge; and (3) that the raising of an untenable defence, or a claim of a balance due after the mortgage has been fully paid off, both constitute misconduct by which the absolute right to costs is forfeited. *Heath v. Chinn* (1908), W. N., 120. In a case where the Judicial Committee found that in the action for redemption the defendants had been obstructive and oppressive and they had unduly and intentionally prolonged the litigation to their own advantage and to the serious detriment of the plaintiff; the defendants were not allowed certain interest and the expenses of taking accounts. *Ganga v. Apurba* (1912), 17 C. W. N., 25. This however was a very exceptional case. In this connection, see *Wynne v. Brady* (1841), 5 Ir. E. R., 239; *Hayward v. Kersey* (1866), 14 L. T., 879; *Wheaton v. Graham* (1857), 24 Beav., 483; *Tomlinson v. Greg* (1867), 15 W. R. (Eng.), 51; *Wilson v. Metcalfe* (1818), 3 Madd., 45; *Harvey v. Tebbutt* (1820), 1 J. & W., 197; *Roberts v. Williams* (1842), 11 L. J. Ch., 65; *Montgomery v. Calland* (1844), 14 Sim., 79; *Begbie v. Fenwick* (1871), L. R., 6 Ch., 869; *Fracklyn v. Fern* (1740), Barnard, 30; *England v. Codrington* (1758), 1 Eden, 174; *Barlow v. Gains* (1856), 23 Beav., 244; *Wilson v. Cluer* (1841), 4 Beav., 214; *Pawley v. Colyer* (1868), 16 W. R. (Eng.), 114; *Snagg v. Frizell* (1846), 3 Jo. & Lat., 383; *Snagg v. Frith* (1846), 9 Ir. Eq. R., 285; *Gilbert v. Golding* (1791), 2 Anst., 442; *Harmer v. Priestley* (1853), 16 Beav., 569; *Wetherell v. Collins* (1818), 3 Madd., 255; *Norton v. Cooper* (1854), 5 DeG. M. & G., 728; *Robert v. Jeffrys* (1830), 8 L. J. (O. S.) Ch., 137; *Powell v. Trotter* (1861), 1 Dr. & Sm., 388. See also *Ram Chandra v. Jonardan* (1889), 14 Bom., 1924; *Narayana v. Narayana* (1884), 8 Mad., 284, seems to be a rather strong case. **Costs of disclaiming defendants.** See *Ford v. Chesterfield* (1853), 16 Beav., 516; *Bellamy v. Brickenden* (1858), 4 K. & J., 670. See also the notes to rule 2, *ante*.

When is a receiver appointed.

Appointment of receiver.—To justify an appointment of an *interim* receiver in a redemption-suit, there must be strong evidence of imminent danger of the property being lost. *Tribhoban v. Jamuna* (1889), Bom. P. J., 184. As to the circumstances under which a receiver may be appointed against a mortgagee in possession after decree at the instance of another mortgagee who is a co-defendant, see *Hiles v. Moore* (1852), 15 Beav., 175; see also *Bord v. Tollemache* (1862), 1 N. R., 177; where a receiver was appointed at the instance of a second mortgagee who was the plaintiff in an action to redeem. *Quære*, whether the court may grant a receiver against the mortgagor in possession at the instance of a defendant. *Barlow v. Gains* (1845), 8 Beav., 329. Where on a bill to redeem, an account is decreed, and pending exceptions to the report, the defendant, the mortgagee

commits waste, the court will order the mortgagee to deliver up possession, on the plaintiff giving security to abide the event of the account. *Hanson v. Derby* (1700), 2 Vern., 392. **Mortgagee's right to give up possession.** In one case a mortgagee in possession of part of the mortgaged lands, having under a decree to account been charged with a high occupation-rent, was permitted to surrender the lands to the receiver upon the expiration of the current year, commencing with the day upon which he first went into possession. *Gregg v. Arrett* (1838), S. & Sc., 674.

Order for sale.—Reading rules 7 and 8 together, it is clear that a sale can be ordered only at the instance of the mortgagee in an action for redemption.^[1] It seems that the court may, in an action for redemption, direct a sale by an usufructuary mortgagee, though this is somewhat inconsistent with the very nature of an usufructuary mortgage as well as with proviso (a) to sec. 67 of the Transfer of Property Act. But where the court did not order a sale in the case of an usufructuary mortgage but made a direction that in default of payment the mortgagor's right to redeem would be extinguished and the mortgagor did not take any exception to the order and the decree became final, the plaintiff was held not to be entitled to bring a second suit for redemption. *Lachman v. Madsudan* (1907), 29 All., 481; 4 A. L. J., 447. In *Krishna v. Jakeral* (1909), 10 C. L. J., 115, it was held that where in a suit for redemption no direction was made fixing the time for payment nor any order made for foreclosure or sale, the decree was not a decree under the repealed section 92 of the Transfer of Property Act, and it was to be executed as an ordinary decree to which Art. 179 of the Limitation Act, 1877, would apply.

It has been said that although a mortgagor is bound to pay the whole of the mortgage-debt before he can redeem any portion of the mortgaged property, there is nothing to prevent him from relinquishing the right to redeem a portion of the property while suing to redeem the rest. *Venkatvaraha v. Kotrapa* (1901), 3 Bom. L. R., 935.

8. (1) Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) ordering the defendant to deliver up the documents which under the terms of the preliminary

When order
for sale made.

Final decree
in redemption-
suit.

[1] The law is different in England: 44 & 45 Vict., C. 41, s. 25 (1), and see *Brewer v. Square* (1882), 2 Ch., 111. In *Govinda v. Veeran* (1911), 36 Mad., 32, the mortgagor was held entitled to apply for sale.

ary decree he is bound to deliver up, and, if so required,

(b) ordering him to retransfer the mortgaged property as directed in the said decree, and, also, if necessary,

(c) ordering him to put the plaintiff in possession of the property.

(2) Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same :

Power to
enlarge time.

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for payment.

This rule corresponds with the repealed sec. 93 of the Transfer of Property Act, the arrangement of the clauses and the language having been improved. An alteration has been made in sub-rule (3).

Right to bring fresh suit for redemption.—Where a member of an undivided Hindu family, not being the manager, obtains a decree for redemption of a mortgage of the family property, but fails to execute it, that will not prevent another member of the family from redeeming his share. *Sakhasam v. Gopal* (1884), Bom. P. J., 4; *disting. Gansavant v. Narayan* (1883), 7 Bom., 467. See also p. 618, *ante*. Right to bring second suit.

For an instance where a second suit for redemption was held to be maintainable in order to do complete justice between the parties as the previous decree for redemption could not be executed owing to the exceptional circumstances occasioned by the mutiny, see *Chaudhri Ahmad v. Seth Raghubar* (1905), 32 I. A., 229; 28 All., 1.

Where such payment is not so made, &c.—The time runs from the date of the decree of the court of first instance in case of an unsuccessful appeal. *Faijuddi v. Asirmuddi* (1907), 11 C. W. N., 679, and see p. 600, *ante*. Where the mortgagor after paying the full amount fixed within the time limited attached a portion of the sum in execution of his decree for costs and had withdrawn it, he did not thereby lose his right to possession of the mortgaged property. *Parmanand v. Lokman* (1904), 27 All., 392; 2 A. L. J., 10.

It is a moot question whether non-payment of the mortgage-money within the time fixed by the court under rule 7 would operate as a foreclosure, if the time is not enlarged under rule 8, where the decree contains no order for foreclosure on default of payment. See pp. 599, 600, 617, 618, *ante*; see also the notes to rule 2, *ante*. See also *Keramat v. Inayat* (1884), 4 A. W. N., 329; *Hay v. Raziuddin* (1897), 19 All., 203; *Bepin v. Mokunda* (1908), 36 Cal., 122; 8 C. L. J., 547; *Krishna v. Jakeral* (1909), 10 C. L. J., 115. But the account taken by the court will be conclusive in any subsequent suit. *Navlu v. Raghu* (1884), 8 Bom., 303; *Dasharatha v. Navalchand* (1891), 16 Bom., 134; *Rambhat v. Ragho* (1892), *ib.*, 656; see also *Tatya v. Balaji* (1883), 7 Bom., 330, decided under Act XVII of 1889. It is hardly needful to state that an assignee of the equity of redemption *pendente lite* cannot bring a fresh action to redeem. *Ram v. Mahadaji* (1884), 9 Bom., 141. See also the notes to s. 52, *ante*. Effect of non-payment.

Mortgagor when entitled to immediate possession.—Where either nothing is due, or any costs have been awarded to the mortgagor and the amount of such costs exceeds the mortgage-debt, the mortgagor will be entitled to obtain possession at once and to recover the balance, if any, from the mortgagee. *Sidu v. Bali* (1892), 17 Bom., 32.

When a decree for redemption is incapable of enforcement.—Where a redemption-decree, dated 23rd December 1889, directed that the redemption-money was to be paid in March 1887, Where decree incapable of enforcement.

but contained no foreclosure clause and the mortgagor applied for execution of the decree in 1891, it was held that, as the time fixed was prior to the decree itself, it was incapable of execution. *Appa v. Bhaskar* (1893), Bom. P. J., 242. It has been held in Bombay that where a decree for redemption mentions no time for payment, it must be taken as operating from its date and no redemption will be permitted after the expiration of the period prescribed by Article 179 of the Limitation Act, 1877. *Maruti v. Krishna* (1899), 23 Bom., 592; *Etyati v. Matalakat* (1904), 28 Mad., 211; see also *Krishna v. Jakeral* (1909), 10 C. L. J., 115; cf. *Ali Ahmed v. Naziran* (1902), 24 All., 542.

Enlargement
of time.

Provided that the Court may upon good cause, &c.—In calculating the time for redemption, the day on which the decree was made should be excluded. *Hindu v. Sardar* (1888), 8 A. W. N., 80. As a general rule the court will not enlarge the time for payment, except under very special circumstances; and in one case the mortgagor's action was dismissed after the day appointed for payment had passed, though he subsequently tendered the principal and interest due to the day of tender. *Faulkner v. Bolton* (1835), 7 Sim., 319 [1]. See however p. 599, *ante*, and *Rango v. Bhomshetti* (1901), 26 Bom., 121; 3 Bom. L. R., 554; *Ishwar v. Gopal* (1903), 28 Bom., 102; 5 Bom. L. R., 719, where the day fixed for payment had passed; see also *Rambrichh v. Sarbanand* (1909), 6 A. L. J., 537. For an order in a redemption-suit enlarging time for a fortnight, plaintiff paying costs of the application, and interest on the total amount, the amount certified to be due being deposited in a bank, with an undertaking by W (not a party to the suit) to pay off the defendant, if the title was good; see Seton, p. 1984. The time was enlarged in another case on the ground that the plaintiff failed to lodge the money in court under a *bonâ fide* mistake; Kekewich, J., remarking that, notwithstanding the form of the order in default of such lodgment within two months from the date of this order, the action be dismissed with costs, the action was not dead but was only comatose or moribund and a final stroke was required to kill it. *Collinson v. Jeffery* (1896), 1 Ch., 644; cf. *Het v. Tika* (1912), 34 All., 388. Time may be extended under this rule for redemption of a prior mortgage in a suit for sale by a puisne mortgagee. *Kalian v. Sadho* (1912), 35 All., 116. **Court to which application should be made.** Where a decree for redemption has been made by an appellate court, the application

[1] The report in 4 L. J. (N. S.) Ch., 81 is, as pointed out in *Fisher*, inaccurate. It seems that the counsel for the defendant moved on notice that the bill might be dismissed with costs; but the learned reporter

points out that the motion might have been made as of course; citing *Stuart v. Worral* (1871), 1 Bro. c.c., 581; and Seton on Decrees, 147; *Novosielski v. Wakfield* (1806), 17 Ves., 417.

should be made not to that court but to the court of first instance. *Sheo-narain v. Chuni Lal* (1900), 23 All., 88; *Ram v. Lalit* (1909), 31 All., 328; 6 A. L. J., 251; *Shamuldhun v. Lakkimani* (1910), 13 C. L. J., 459.

The Court shall, on application, &c.—When a decree for redemption has been made by the appellate court, an application for a decree absolute for sale should be made not to the court of appeal but to the court of first instance. *Venkata v. Chethi* (1899), 23 Mad., 521; 10 M. L. J., 145. The omission of the court to draw up the proper decree under rule 7 would not deprive the mortgagee of the relief provided by this rule. *Murlidhar v. Parsharam* (1900), 25 Bom., 101. If the mortgagee does not obtain an order for sale, it seems he cannot bring a fresh suit. *Malaji v. Sagaji* (1888), 13 Bom., 567.

To which Court application for decree to be made.

Appeal.—An order refusing to extend the time for payment of the mortgage-money is appealable under Order 43, rule 1 (o) of the Civil Procedure Code.

9. Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

Decree where nothing is found due or where mortgagee has been overpaid.

This rule is new and there was no corresponding provision in the Transfer of Property Act. No fresh action will lie for overpayments by the mortgagor. See p. 612, *ante*. As to the liability of the mortgagee to pay interest on overpayments, see pp. 564, 565, *ante*.

No fresh suit for overpayments.

As to the liability of the mortgagee for costs when he has been overpaid, see *Barlow v. Gains* (1856), 23 Beav., 244, 246; *Charles v. Jones* (1887), 35 Ch. D., 544, 548; *Heath v. Chinn* (1908), W. N., 120.

10. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.

Costs of mortgagee subsequent to decree.

This rule corresponds generally with the repealed sec. 94 of the Transfer of Property Act. Reference has been made to costs payable under this rule in rules 3, 5 and 8 with reference to a final decree for foreclosure, sale and redemption. The word 'foreclosure' was inadvertently omitted in the repealed section.

Conduct of the mortgagee. See *Heath v. Chinn* (1908), W.N., 120; *Ganga v. Apurba* (1912), 17 C. W.N., 25.

Such costs of suit as have been properly incurred, &c.—

This refers to costs incurred by the mortgagee after the accounts have been taken and a decree made either for foreclosure, sale, or redemption; such as the expenses of retransfer, giving possession, costs of sale, &c. But where a mortgagee incurred further costs in another proceeding after the accounts had been taken under a decree for foreclosure, it was held that as such costs were not provided for by the decree, the mortgagee could not by petition obtain an order to add them to his security. *Barron v. Lancefield* (1853), 17 Beav., 208. The costs of the subsequent reconveyance, or of the proceedings consequent thereon, follow the general rule, and are paid by the mortgagor; unless they have been increased by the negligent, capricious, or unnecessary acts of the mortgagee, in which case he will be made to pay the extra costs. *Capper v. Terrington* (1844), 1 Coll., 103, 105; *M. Ry. Co. v. Wescombe* (1841), 11 Sim., 57; and see the cases cited in the notes to rule 2 *ante*. But where the estate has been devised by the mortgagee or has vested in an infant heir, the costs of reconveyance and of revesting the estate are borne by the mortgagor, even when the general costs are ordered to be paid by the mortgagee. *Middleton v. Eliot* (1847), 15 Sim., 531; *Exp. Ommavey* (1841), 10 Sim., 298; *King v. Smith* (1848), 6 Hare, 473.

Mortgagee's costs: when can they be disallowed?

Right of mesne mortgagee to redeem and foreclose.

11. Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.

There was no provision corresponding with this rule in the Transfer of Property Act. This rule must be read with sec. 75 of the Act and it embodies the principle that a puisne mortgagee may redeem up and foreclose down. See p. 799, *ante*. This rule, has been added in compliance with the suggestion of the Privy Council in *Gopi v. Bansidhar* (1905), 32 I. A., 123; 27 All., 325. See also notes to sec. 74, T. P. Act, *ante*.

12. Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Sale of property subject to prior mortgage.

This rule reproduces with verbal alterations the repealed sec. 96.

The Court may with the consent of the prior mortgagee, Sale with consent of prior mortgagee.
 &c.—See pp. 583, 584, *ante*. Where a mortgagee, who was a party to the suit, consented to a sale of the mortgaged property, it was held that he must produce and leave in the Master's office the title-deeds which were necessary in order to complete such sale. *Livesey v. Harding* (1839), 1 Beav., 343. If the prior mortgagee does not give his consent, he must be careful not to take away any part of the proceeds if he wishes to enforce his security against the purchaser. *Jhinka v. Baldeo* (1892), 14 All., 509. It may be noticed that this rule indirectly recognises the right of a puisne mortgagee to sell the mortgaged premises subject to a prior incumbrance. Cf. Civil Procedure Code, 1908, sec. 73, proviso (b). But see *Venkataramana v. Gompertz* (1908), 31 Mad., 425; 18 M. L. J., 298.

Sale by the Court subject to charge.—A statement in a sale-certificate, granted by a court, that the purchase is subject to a charge, Where sale is subject to charge.
 is not conclusive evidence against the purchaser, when it is sought to enforce the charge by suit. *Ram Chandra v. Hazi Kasim* (1892), 16 Mad., 207, 208. See also *Izzat-un-nisa v. Partab* (1909) 36 I. A., 203; 31 All., 583. But it may be otherwise, where the existence of the mortgage has been either admitted by the parties or established by decree or declared under sec. 282 of the Civil Procedure Code, 1882 (now O. 21, r. 62); *Shantappa v. Subrao* (1893), 18 Bom., 175. It may be here mentioned that a person who sells property in execution subject to a certain incumbrance which has been allowed by the court, is not entitled to claim a resale on the ground that the alleged mortgage was null and void. *Parshotam v. Ganesh* (1899), 23 Bom., 759. This rule does not necessarily imply that when the property is not to be sold free from such incumbrance the decree should under all circumstances expressly reserve the prior mortgagee's right even when it is admitted. *Srinivasa v. Yasminabhai* (1905), 29 Mad., 84; 16 M. L. J., 58. For cases where the mortgagee has two or more mortgages on the same property, see p. 594, *ante*.

plication
proceeds.

13. (1) Such proceeds shall be brought into Court and applied as follows :—

Firstly, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

Secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith ;

Thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

Fourthly, in payment of the principal money due on account of that mortgage ; and

Lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, IV of 1882. -

Cf. sec. 73, Code of Civil Procedure, proviso (c), which relates to subsequent and not to prior incumbrances. See *Jagat v. Dhundhey* (1883), 5 All., 566 ; *Mittu v. Kishan* (1890), 12 All., 546. The present rule does not save the rights of the Crown. This rule reproduces with verbal amendments the repealed sec. 97 of the T. P. Act.

Whatever is due to the prior mortgagee, &c.—The prior mortgagee would be entitled to get interest on his mortgage up to the date of the confirmation of the sale on the principle of section 84 of the Transfer of Property Act. *Benode v. Harish* (1910), 15 C. W. N., 783.

Lastly, the residue, if any, shall be paid, &c.—This clause does not provide for unsecured creditors who cannot be said to be interested in the property sold. But they are at liberty to enforce their claims against any surplus payable to the mortgagor. *Padmanabh v. Khemu* (1893), 18 Bom., 684. Where a mortgagee holds two mortgages on the same properties it may be open to him when the decree on the first mortgage is executed to enforce his claim on the second mortgage by proceeding against the surplus proceeds. *Krishnama v. Anangasa* (1907), 17 M. L. J., 301.

Previous state of the law.—In a case decided before the Transfer of Property Act, where there were simultaneous sales by different mortgagees, it was held that they should be satisfied out of the sale-proceeds in the order of priority of their respective securities. See *Gopee v. Kishan* (1896), 25 W. R., 187.

14. (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

Suit for sale necessary for bringing mortgaged property to sale.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, IV of 1882, has not been extended.

This rule has been enacted in the place of the repealed sec. 99 of the Transfer of Property Act, and is narrower in its operation. Under sec. 99 the mortgagee was absolutely precluded from selling the mortgaged property under a claim although it might have no connection whatever with the mortgage-debt. Thus, if the mortgagee recovered a judgment for a libel against the mortgagor who had no other available assets, he might not even in such a case seize the equity of redemption. In justification of this enactment the Law Commissioners observed:—"There is a common practice on the part of mortgagees of suing their mortgagors on the debt as such and in execution selling the mortgagor's interest in the property. This is purchased by strangers to the mortgage, who are thus virtually defrauded by an enforcement of the security of the existence of which they were wholly ignorant."(a) But it is not clear how such a practice could

Alteration in the law.

(a) Report of the Indian Law Commissioners, 1879, p. 35.

When equity
of redemption
could be sold.

have grown up as the courts never allowed the sale of a bare equity of redemption under a judgment on the covenant. *Emam v. Ram* (1875), 23 W. R., 187; *Bhuggobutty v. Shamacharan* (1876), 1 Cal., 337; see also *Narsidas v. Joglekar* (1879), 4 Bom., 57; *Abdulla v. Abdulla* (1880), 5 Bom., 8. The dictum in *Maganlal v. Shakra* (1897), 22 Bom., 945, 948, is opposed to all previous cases on the point. It is true there was an idea that the security did not pass to the purchaser upon a judgment on the covenant recovered on the original side of the High Court. But as the execution of such judgments was always limited to property not comprised in the mortgage, the mortgagee could not retain his security and at the same time sell the equity of redemption. *Belchambers' Practice*, 336, 337. A somewhat different view was taken in Allahabad and Madras of the effect of a sale by a mortgagee under a mere personal judgment against the mortgagor. Compare *Khubchand v. Kaliandas* (1876), 1 All., 240; *Akhe Ram v. Nand* (1876), 1 All., 236; *Balwant v. Gokaran* (1877), 1 All., 433; with *Ponnappa v. Pappana* (1881), 4 Mad., 1; but see *Venkata v. Ramiah* (1879), 2 Mad., 108, 112. But all the courts were agreed that a mortgagee could not enforce his mortgage against a purchaser without notice of it, whether he sold the property for the secured debt or for some other debt due to him. In such cases the mortgagee was held to be estopped from enforcing his mortgage. See *Dullab v. Krishna* (1869), 3 B. L. R., 407; 12 W. R., 303; *Dooli v. Omda* (1875), 24 W. R., 263; *Tuka Ram v. Ram* (1876), 1 Bom., 314; *Nursingh v. Raghubar* (1884), 10 Cal., 609; *Agarchand v. Rakhma* (1888), 12 Bom., 678; *Ram v. Jairam* (1897), 22 Bom., 686; *Muhammad v. Shib* (1899), 21 All., 309; *disting. Dhondo v. Ravji* (1895), 20 Bom., 290. There were however some obsolete judgments of the Calcutta High Court which lent support to the notion that it was possible for a mortgagee to sell the equity of redemption under a judgment on the covenant and afterwards enforce his security against the purchaser. *Kamini v. Ram* (1870), 5 B. L. R., 450; *Ramlochan v. Kamini* (1867), *Ib.*, 460; see also *Ajudhya v. Shama* (1870), *Bourke*, 161, note; *Brojo v. Gobinda* (1869), 4 B. L. R., o. c. j., 83; *Neerunjun v. Oopendra* (1872), 10 B. L. R., 57.

Mortgage not
enforced
against pur-
chaser without
notice.

Application of
sec. 99, T. P.
Act.

The provisions of sec. 99 of the Transfer of property Act were held to apply to mortgages executed before the Act came into operation on the ground that the mode of enforcing a decree was a matter of procedure; *Kaveri v. Ananthayya* (1886), 10 Mad., 129; but not to decrees obtained before the Act. *Dinendra v. Chandra* (1885), 12 Cal., 436; *Makund v. Ram* (1887), 4 A. W. N., 274. In *Nannuvien v. Muthusami* (1905), 29 Mad., 421; 15 M. L. J., 445, it was held that sec. 99 was not merely declaratory of what was accepted and enforced

as law before the passing of the Act and effect ought not to be given to the new restrictions imposed by that section so as to give them retrospective operation, and therefore a sale by the mortgagee of the equity of redemption in execution before the passing of the Act in respect of a claim independent of the mortgage was held to pass the entire interest in the property.

The new rule is restricted to claims arising only under the mortgage and it is now competent to the mortgagee to have the equity of redemption sold in satisfaction of any claim which he might have against the mortgagor unconnected with the mortgage. The provisions of sec. 99 are therefore applicable under the present rule only where the mortgagee desires to bring the mortgaged property to sale in satisfaction of a claim arising under the mortgage.

Change made by the rule.

Construction of sec. 99.—This section of the Transfer of Property Act however was held not to prevent a mortgagee from bringing the mortgaged property to sale in execution of a decree for interest only obtained in accordance with the terms of the mortgage-bond. *Kashi v. Jamna* (1904), 31 Cal., 922. And where the equity of redemption was sold in execution of a decree for sale in a suit for rent brought by the mortgagee on the basis of a lease under which the equity of redemption was pledged as security for the rent, the sale was held good as the suit was under sec. 67 of the Transfer of Property Act. *Parmanand v. Daulat* (1902), 24 All., 549.

Construction of sec. 99, T. P. Act.

Where a decree-holder held a decree for sale on a mortgage as well as a simple money-decree against the same judgment-debtor it was held to be not unlawful for him to bring to sale the mortgaged property for the realization of the amounts of both the decrees. *Behari v. Bhagwan* (1908), 31 All., 114. For other cases bearing on the construction of the section, see *Grant v. Subramaniam* (1898), 22 Mad., 241; *Chattar v. Newal* (1889), 12 All., 64; *Mahabir v. Saira* (1895), 17 All., 520; *Chundra v. Burroda* (1895), 22 Cal., 813; *Abhoyeswari v. Gouri* (1895), 22 Cal., 859; *Matangini v. Chooney* (1895), 22 Cal., 903; but see *Anna v. Thangathammal* (1896), 20 Mad., 78; *Meer v. Subbaramappa* (1895), 5 M. L. J., 230; *Jogemaya v. Thackomoni* (1896), 24 Cal., 473; cf. *Gouri v. Abhoyeswari* (1896), 25 Cal., 262; *Chundra v. Mutty* (1897), 2 C. W. N., 33; *Lal Behary v. Habibur* (1898), 26 Cal., 166; *Kizakini v. Kizakini* (1892), 2 M. L. J., 188. This section however did not prevent the mortgagee from suing on the covenant and levying execution on other properties belonging to the mortgagor. *Ram v. Sonatan* (1898), 2 C. W. N., 320; but see *Musaheb v. Inayatullah* (1892), 14 All., 513.

Security-bond
by judgment-
debtor how
enforced.

As to the question whether where a security-bond is executed by a judgment-debtor for the due performance of the final decree of the court, the decree-holder is entitled to bring the property given as security to sale otherwise than by instituting a suit for sale under sec. 67 of the Act, see *Janki v. Sarup* (1895), 17 All., 99; *Shyam v. Bajpai* (1903), 30 Cal., 1060; 7 C. W. N., 914; *Tokhan v. Girwar* (1905), 32 Cal., 494; 9 C. W. N., 372; 1 C. L. J., 118; *disting. Harmanoje v. Ramprosad* (1907), 6 C. L. J., 462; *Bajinath v. Siaram* (1913), 17 C. L. J., 267; in the last case the judges who referred the case to the full bench expressed their disapproval of the decision in *Tokhan v. Girwar*, *supra*.

Prohibition
applied also
to usufruc-
tuary mort-
gages.

Usufructuary mortgages.—The prohibition under sec. 99 was held to extend to an usufructuary mortgagee although he was incompetent to bring the mortgaged premises to sale, even where he had recovered judgment under sec. 68 of the Act. *Azimullah v. Najmunnissa* (1894), 16 All., 415; *Vigneswara v. Bapayya* (1892), 16 Mad., 436; *Sheodeni v. Ram* (1898), 26 Cal., 164; *Basiruddi v. Kailas* (1905), 33 Cal., 113; cf. *Ganesh v. Debi* (1910), 32 All., 377; 9 A. L. J., 321.

Where an usufructuary mortgagee, who had no right to sue for the mortgage-money obtained a decree against the mortgagor on a claim independent of the mortgage and in execution of such decree attached the interest of the mortgagor in the mortgaged properties, it was held that he was entitled to bring a suit on his mortgage under the provisions of section 99 of the Transfer of Property Act, and the decree in such a suit should be one for the sale of the property free from the mortgage. *Govinda v. Narain* (1906), 29 Mad., 424.

Rule enforced
even where
charge created
by decree.

Otherwise than by instituting a suit, &c.—It appears to have been held that according to the provisions of sec. 99, though immovable property might be expressly charged to secure payment of money by a decree of court, no step could be taken for the purpose of realizing such money except by bringing a fresh action. *Chundra v. Burroda* (1895), 22 Cal., 813; *Matangini v. Chooney* (1895), 22 Cal., 903; *Aubhoyessury v. Gouri* (1895), 22 Cal., 859; in the last case by a consent-decree the payment of the decretal amount was to be made by instalments and properties were charged for payment of the instalments.

Where a mortgagee brought a suit on his mortgage and the suit was compromised and the mortgagee took a money-decree, in which the property originally mortgaged was set out as being charged under the decree, it was held that the decree-holder could not bring the mortgaged property to sale in execution, but must institute a suit

under sec. 67 of the Transfer of Property Act. *Hem v. Bihari* (1905), 28 All., 58; 2 A. L. J., 479. And the mortgagee was held not entitled to sell the mortgaged property in execution although he relinquished his mortgage-lien and obtained a simple money-decree. *Madho v. Baijnath* (1905), 2 A. L. J., 356. But in *Ganesh v. Debi* (1910), 32 All., 377; 9 A. L. J., 321, where an usufructuary mortgagee who had not obtained possession, brought a suit for possession which was compromised and by consent a simple money-decree was passed in favour of the mortgagee, it was held that the mortgagee was not precluded from bringing the mortgaged property to sale in execution of the decree. See also *Kashi Pershad v. Duleep* (1904), 8 C. W. N., 264. Disting. *Narshingh v. Munna* (1909), 6 A. L. J., 731.

A fresh suit, however, was not held to be necessary, if there was a provision in the decree that in default of payment the property charged or a sufficient part thereof be sold, liberty being reserved to the parties to apply. *Hemanginee v. Kumode* (1893), 26 Cal., 441; see also *Aubhoyessury v. Gouri* (1895), 22 Cal., 859, 863. The mortgagee, however, was not precluded from attaching the property. *Chundra v. Burroda* (1895), 22 Cal., 813; *Jogemaya v. Thackomoni* (1896), 24 Cal., 473; *Kaji Inus v. Kaji* (1906), 8 Bom. L. R., 576; *Nathubhai v. Bai Ujan* (1908), 32 Bom., 205; 10 Bom. L. R., 274.

Transferees.—The transferee of a money-decree obtained by a mortgagee against his mortgagor was held bound by the restrictions imposed upon the mortgagee by sec. 99. He could attach the mortgaged property but could not bring it to sale otherwise than by instituting a suit under sec. 67 of the Transfer of Property Act. *Ohagan v. Lakshman* (1907), 31 Bom., 462; 9 Bom. L. R., 728; *Jivarathnam v. Srinivasa* (1907), 31 Mad., 33; 17 M. L. J., 503; disting. *Banh v. Manni* (1905), 27 All., 450; 2 A. L. J., 121.; cf. *Narhar v. Shivram* (1905), 7 Bom. L. R., 816.

Procedure after repeal of sec. 99.—The Civil Procedure Code, 1908, in so far as it repealed sec. 99 of the Transfer of Property Act and substituted in its place O. 34, r. 14, merely effected a change of procedure in the manner in which mortgaged property has to be realised in execution of money-decrees and therefore the rule now in force should be applied in enforcing decrees previously obtained. *Bai Ganga v. Rajaram* (1911), 35 Bom., 248; 13 Bom. L. R., 245.

Effect of sale in contravention of the provisions of the rule.—It was held in some of the earlier cases that a sale in contravention of the provisions of sec. 99 was absolutely void. *Shoodeni v. Ram* (1898), 26 Cal., 164; *Shib v. Kali* (1903), 30 Cal., 463. Thus a son in a Mitakshara family was held not to be bound by a sale in defiance of

Effect of order
in contraven-
tion of rule.

sec. 99 under a decree obtained against the father, although he might be bound by a sale under a mortgage-decree against the father. *Muthuraman v. Sundra* (1899), 9 M. L. J., 113. Where in execution of a decree upon the covenant, the mortgagee obtained an order for the sale of the mortgaged property giving him the same rights against the sale-proceeds as he had against the property; it was held that the order for sale at the instance of the mortgagee was illegal under sec. 99, and that the clause in the order giving the mortgagee the same rights against the sale-proceeds as he had against the property sold was void and of no effect as against a judgment-creditor who was no party to the order. *Grant v. Subrahmanyam* (1898), 22 Mad., 241; 9 M. L. J., 179. And a sale was held void although only a portion of the property was under mortgage. *Sonu v. Behari* (1905), 33 Cal., 283. But see *Tarachand v. Imdad* (1896), 18 All., 325; *Mayan Pathuti v. Pakuram* (1898), 22 Mad., 347; 9 M. L. J., 98; *Thaleri v. Thandora* (1899), 10 M. L. J., 110; *disting. Sathuvoyyan v. Muthusami* (1888), 12 Mad., 325; *Durgogga v. Ananthu* (1890), 14 Mad., 74; *Muthu v. Sita* (1898), 22 Mad., 372; where the interests of third persons not parties to the suit were concerned. The mortgagor could apply to have the sale set aside under sec. 244, Civil Procedure Code of 1882, before the confirmation of the sale, but not after confirmation. See *Sonu v. Behari*, *supra*. In the following cases the sale was held not liable to be questioned although not in accordance with the provisions of sec. 99, as the parties did not object in proper time. *Dharanikota v. Budharazu* (1907), 30 Mad., 362; *Kishan v. Umrao* (1908), 30 All., 146; 5 A. L. J., 121; see also *Lachmi v. Nand* (1902), 29 Cal., 539; 6 C. W. N., 484; *Mangli v. Pati* (1904), 1 A. L. J., 360. And there can however be little doubt that a sale in contravention of sec. 99 is not a nullity, but merely an irregular sale which is liable to be avoided. *Khairajmal v. Daim* (1904), 32 I. A., 23; 32 Cal., 296; *Ashutosh v. Behari* (1907), 35 Cal., 61; 11 C. W. N., 1011; 6 C. L. J., 320; *Muthu v. Karuppan* (1907), 30 Mad., 313; 17 M. L. J., 163; *Muhammad v. Dilsukh* (1905), 27 All., 517; 2 A. L. J., 210.

Such sale
merely irre-
gular.

Construction
of inartistic-
ally drawn
decrees.

Inartistically drawn decrees how construed.—See *Lal Behary v. Habibar* (1898), 26 Cal., 166; *Jogemaya v. Thakomonee* (1896), 24 Cal., 473; *Fazil v. Krisna* (1897), 25 Cal., 580; *Chandra v. Barroda* (1895), 22 Cal., 813; *Pahalwan v. Narain* (1900), 22 All., 401; *Anna Pillai v. Thangathanimal* (1896), 20 Mad., 78; *Muthuraman v. Ettappasami* (1898), 22 Mad., 372; *Jogendra v. Rama* (1906), 4 C. L. J., 533. For cases before the Transfer of Property Act, see *Debi v. Pribhu* (1881), 3 All., 388, F. B.; *Ram v. Raghu* (1880), 3 All., 239; *Solano v. Moran* (1879), 4 C. L. R., 11.

Notwithstanding anything contained in O. 2, r. 2.—This rule allows a mortgagee to bring a suit for sale after obtaining a judgment on the covenant, as did the repealed sec. 99 of the Transfer of Property Act. Before the passing of that Act, the law was rather in a confused state. See *Gumani v. Ramapadarath* (1880), 2 All., 838; *Bahraichi v. Surju* (1881), 4 All., 257; *Umrao v. Behari* (1880), 3 All., 297; *Jonmenjoy v. Dossmoney* (1881), 7 Cal., 714; *Enam v. Raj Coomar* (1875), 23 W. R., 187; *Rajkishore v. Bhadoo* (1881), 7 Cal., 78. But the mortgagee could always maintain a second suit on his security if the court which tried the first suit had no jurisdiction over the land. *Girish v. Ramessuree* (1874), 22 W. R., 308; *Bungsee v. Soodist* (1881), 7 Cal., 739; 10 C. L. R., 263; *Narasinga v. Venkata* (1892), 16 Mad., 481. It seems that the mortgagee may bring a suit for sale, even if he suffers the judgment on the covenant to be barred by limitation. But see *Calinath v. Kunja* (1883), 9 Cal., 651, a case not decided under the Transfer of Property Act. Cf. *Chunni v. Banaspat* (1886), 9 All., 23; *O'Brien v. Lewis* (1863), 4 Giff., 396; see also Jones, sec. 937; *Lloyd v. Mason* (1844), 4 Hare, 132; *Exp. Sheil* (1877), 4 Ch. D., 789. Where, however, a mortgagee had previously instituted a suit for sale to enforce his security but was content in that suit to take merely a money-decree, he was held not entitled to bring another suit for sale of the mortgaged property, such suit being barred as *res judicata*. *Shibu v. Chandra* (1906), 33 Cal., 849. But where a sale was set aside as being in contravention of the provisions of sec. 99, the mortgagee was held not to be debarred from subsequently bringing a suit for sale on his mortgage. *Bhola v. Muhammad* (1903), 26 All., 223. This rule only relieves a mortgagee from the restriction placed on the splitting of his remedies, leaving the rest of the restriction unimpaired. See *Govind v. Parashram* (1900), 25 Bom., 161. For the Roman Law on the subject, see Kelleher, p. 77.

Policy of the law.—It has been said that on the principle underlying sec. 99, it was impossible for the mortgagee to acquire an irredeemable title whether the property was sold by himself or purchased by him at a sale in execution of a decree obtained by a third person, even in the absence of any evidence of fraud or collusion between the mortgagee and the latter. See *Martand v. Dhondo* (1897), 22 Bom., 624; *Mayan v. Pakuran* (1898), 22 Mad., 347; *Erusappa v. Commercial, &c., Bank, Ltd.* (1899), 23 Mad., 377. See also *Prusappa v. Commercial, &c., Bank* (1899), 10 M. L. J., 91, where the principle received a further extension. Cf. *Kuttan v. Krishnam* (1902), 12 M. L. J., 390. But arguments derived from underlying principles are seldom very conclusive. See *Sesha v. Krishna* (1900), 24 Mad., 96; *Ikkotha v. Chakkiamma* (1903), 27 Mad., 428.

Free suit for sale when allowed.

Application of rule under sec. 99, T. P. Act.

See also the cases cited in note 2, p. 607, *ante*. The dictum in *Pancham v. Kishun* (1910), 14 C. W. N., 579; 12 C. L. J., 574, that it is a well established principle that a purchase by the mortgagee of the equity of redemption constitutes him a trustee for the mortgagor and that he does not acquire an irredeemable title is too wide. See *Mohant Ram Sunder v. Nathuni* (1911), 13 C. L. J., 664, for the results which this rule is intended to prevent.

Charges.

15. All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act, IV of 1882.

This rule has been enacted and the provisions relating to the procedure for enforcement of charges contained in sec. 100 of the Transfer of Property Act have been repealed.

Sale or redemption in case of charge.

All the provisions, &c.—“ It seems on the whole to be settled that where there is a charge simpliciter and not a mortgage, or an agreement for a mortgage, then the right of the parties having such a charge is a sale and not a foreclosure.” Per Lord Chancellor Hatherley in *Tennant v. Trenchard* (1869), L. R., 4 Ch., 537. See also *Earl Poulett v. Hood* (1866), 35 Beav., 239, 240; cf. *Sampson v. Pattison* (1842), 1 Hare, 533; *In re Owen* (1894), 3 Ch., 220. Disting. *Hornsey District Council v. Smith* (1897), 1 Ch., 864, 865, decided on a special Act. Strictly speaking there is no suit for redemption in the case of a mere charge. *Narayana v. Venkataramana* (1902), 25 Mad., 220, 240. It would seem that a charge though created by a decree can only be enforced by a suit for sale. See notes under r. 14, p. 984, *ante*.

In the case of annuities, it is sometimes extremely difficult to say whether there is a charge on the estate itself so as to be realizable by the sale of it, or only on the rents and profits. No general or inflexible rule can be laid down, the question being one purely of intention to be ascertained from the language of the instrument. *Clifford v. Arendell* (1860), 1 DeG. F. & J., 307, 311. Cf. *Taylor v. Emerson* (1843), 6 Ir. Eq., 224. A sale may be directed in England though there is no express charge on the land, to raise arrears of a rent charge issuing out of the rents and profits of the land. *Hambro v. Hambro* (1894), 2 Ch., 564. Disting. *Blackburne v. Hope Edwards* (1901), 1 Ch., 419; cf. *Churaman v. Bulli* (1887), 9 All., 591; *Chalamanna v. Subbamma* (1883), 7 Mad., 23. For the right of a tenant for life to claim

that sums spent by trustees on improvements shall be charged on the Charges. corpus, he keeping down the interest; see *Ouchterlony & Ouchterlony* (1888), 11 Mad., 360. Rent is not a charge, in Bengal, within sec. 100 of the Transfer of Property Act. *Fotick v. Foley* (1887), 15 Cal., 492; *Tarini v. Narain* (1889), 17 Cal., 301; *Sourendro v. Shorno* (1898), 26 Cal., 103. Cf. *Gajaputty v. Sarya* (1898), 22 Mad., 11; *Lingon v. Bikrama* (1900), 10 M. L. J., 256; *Royzuddi v. Kalinath* (1906), 33 Cal., 985; 4 C. L. J., 219; but see *Ratan v. Umed* (1897), 11 C. P. L. R., 95. It may be noted that under the Bengal Tenancy Act the charge created by sec. 65 can only be enforced by the sale of the tenure or holding and in no other way. *Shosi v. Gogan* (1894), 22 Cal., 364.

See notes to sec. 100 of the Transfer of Property Act, *ante*.

As to whether the holder of a charge is entitled to obtain a decree under r. 6, *ante*, see *Uttam v. Phulman* (1905), 28 All., 365; 2 A. L. J., 379.

FORMS.

Forms of pleadings in mortgage-suits given in Appendix A, Schedule I of the Code of Civil Procedure, 1908.

APPENDIX A.—PLEADINGS.

PLAINTS.

No. 45.

FORECLOSURE OR SALE.

(Title.)

A. B. the above-named plaintiff, states as follows:—

1. The plaintiff is mortgagee of lands belonging to the defendant.
2. The following are the particulars of the mortgage:—

- (a) (date);
 - (b) (names of mortgagor and mortgagee);
 - (c) (sum secured);
 - (d) (rate of interest);
 - (e) (property subject to mortgage);
 - (f) (amount now due);
 - (g) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).
- (If the plaintiff is mortgagee in possession, add.)

3. The plaintiff took possession of the mortgaged property on the day of and is ready to account as mortgagee in possession from that time. .

[As in paras. 4 and 5 of Form No. 1.]¹

4. The plaintiff claims :—

(1) payment, or in default [sale or] foreclosure {and possession} ;

[Where Order 34, rule 6, applies.]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No. 46.

REDEMPTION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.

2. The following are the particulars of the mortgagee :—

(a) (date) ;

(b) (names of mortgagee and mortgagor) ;

(c) (sum secured) ;

(d) (rate of interest) ;

(e) (property subject to mortgage) ;

(f) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the defendant is mortgagee in possession, add).

3. The defendant has taken possession [or has received the rents] of the mortgaged property.

[As in paras. 4 and 5 of Form No. 1.]¹

4. The plaintiff claims to redeem the said property and to have the same reconveyed to him [and to have possession thereof].

¹ Paragraphs 4 and 5 of Form No. 1 referred to above are :—

4. [Facts showing when the cause of action arose and that the Court has jurisdiction.]

5. The value of the subject-matter of the suit for the purpose of jurisdiction is rupees and for the purpose of court-fee is rupees.

WRITTEN STATEMENTS.

No. 11.

DEFENCE TO SUIT FOR FORECLOSURE.

1. The defendant did not execute the mortgage.
2. The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied*).
3. The suit is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.
4. The following payments have been made, viz :— Rs.
 (Insert date.) _____, 1,000
 (Insert date.) _____, 500
5. The plaintiff took possession on the _____ of _____, and has received the rents ever since.
6. That plaintiff released the debt on the _____ of _____.
7. The defendant transferred all his interest to A. B. by a document, dated _____

No. 12.

DEFENCE TO SUIT FOR REDEMPTION.

1. The plaintiff's right to redeem is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.
2. The plaintiff transferred all interest in the property to A. B.
3. The defendant, by a document dated the _____ day of _____ transferred all his interest in the mortgage-debt and property comprised in the mortgage to A. B.
4. The defendant never took possession of the mortgaged property, or received the rents thereof.
 (*If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits.*)

Forms of decrees in mortgage-suits in Appendix D, Schedule I, of the Code of Civil Procedure.

APPENDIX D.—DECREES.

No. 3.

PRELIMINARY DECREE FOR FORECLOSURE.—(O. 34, r. 2.)

(Title.) ..

This suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on account of principal, interest and

costs calculated up to the day of 19 , is
Rs. ; and it is decreed as follows :—

(1) That if the defendant, pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. [*Where the plaintiff claims by derived title add or by those under whom he claims.*] [*Where the plaintiff is in possession add and shall put the defendant in possession of the property.*]

(2) That if such payment is not made on or before the said day of 19 the defendant shall be debarred from all right to redeem the property.

Schedule.

Description of the mortgaged property.

No. 4.

PRELIMINARY DECREE FOR SALE. (O. 34, r. 4.)

(Title.)

This suit coming on this day, etc. ; It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is Rs. and that such amount shall carry interest at the rate of per cent. per annum until realization ; and it is decreed as follows :—

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. [*Where the plaintiff claims by derived title add or by those under whom he claims.*] [*Where the plaintiff is in possession add and shall put the defendant in possession of the property.*]

(2) That if such payment is not made on or before the said day of 19 the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent costs, and that the balance, if any, be paid to the defendant.

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

Schedule.

Description of the mortgaged property.

No. 5.

PRELIMINARY DECREE FOR REDEMPTION. (O. 34, r. 7.)

(Title.)

This suit coming on this day, etc. ; It is hereby declared that the amount due to the defendant on account of principal, interest and costs calculated up to the day of 19 is Rs. ;

and it is decreed as follows :—

(1) That if the plaintiff pays into Court the amount so declared due on or before the said day of 19, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him. [Where the defendant claims by derived title add or by those under whom he claims.] [Where the defendant is in possession add and shall put the plaintiff in possession of the property.]

(2) That if such payment is not made on or before the said day of 19, the plaintiff shall be debarred from all right to redeem the property. [If the mortgage is simple or usufructuary substitute the property shall be sold.]

Schedule.

Description of the mortgaged property.

No. 6.

DECREE FOR FORECLOSURE.—FIRST MORTGAGEE v. SECOND MORTGAGEE AND MORTGAGOR.—SUCCESSIVE PERIODS FOR REDEMPTION.

(Title.)

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 (a) is Rs. x, and that on the day of 19 (b) there will be due to the plaintiff for interest the further sum of Rs. , making in all Rs. y ; and it is further declared that on the day of 19 , (b) there will be due to the first defendant on account of principal, interest and costs Rs. z ; and it is decreed as follows :—

(1) That if the first defendant pays into Court the said sum of Rs. x, on or before the said day of 19 , (a) the plaintiff shall deliver up, etc. (as in Form No. 3).

(2) That in default of the first defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(3) That in case of such foreclosure and if the second defendant pays into Court the said sum of Rs. y, on or before the day of 19 , (b) the plaintiff shall deliver up, etc. (as in Form No. 3).

(4) That in default of the second defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(5) That in case the first defendant shall redeem the mortgaged property, if the second defendant pays into Court the said sums of Rs. y and Rs. z on or before the day of 19 , (b) the first defendant shall deliver up, etc. (as in Form No. 3).

(6) That in default of the second defendant paying the said sums on or before the said day he shall be debarred from all right to redeem the property. [*Where the second defendant is in possession add and shall put the first defendant in possession of the property.*]

(a) Insert a day within six months from the date of decree.

(b) Insert a day within three months from the date mentioned in (a).

No. 7.

DECREE FOR SALE.—FIRST MORTGAGEE v. SECOND MORTGAGEE AND MORTGAGOR.—ONE PERIOD FOR REDEMPTION.*(Title.)*

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is Rs. *x*, and that on the said day there will be due to the first defendant on account of principal, interest and costs Rs. *y*;

and it is decreed as follows :—

(1) That if the defendants or either of them pay into Court the said sum of Rs. *x* on or before the said day of 19 the plaintiff shall deliver up., etc., (as in Form No. 4).

(2) That if payment of the said sum is not made on or before the day of 19, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court to the credit of this suit, and applied, first, in payment to the plaintiff of the said sum of Rs. *x* and such subsequent interest and costs as may be allowed by the Court; secondly, in payment to the first defendant of the said sum of Rs. *y* and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant.

(3) That in case the defendants or either of them shall pay the said sum of Rs. *x* as aforesaid, he or they shall be at liberty to apply to the Court that the plaintiff's mortgage may be kept alive for the benefit of the person making the said payment or otherwise as he or they may be advised.

(4) That if the net proceeds of the sale are sufficient to pay the said sum of Rs. *x* and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

No. 8.

DECREE FOR SALE.—SECOND MORTGAGEE v. FIRST MORTGAGEE AND MORTGAGOR.—ONE PERIOD FOR REDEMPTION.*(Title.)*

[Insert declarations of the amounts due to the plaintiff Rs. *y* and to the first defendant Rs. *x* as in Form No. 7.]

And it is decreed as follows :—

(1) That if the plaintiff or the second defendant pays into Court the said sum of Rs. *x* on or before the said day of 19 , the first defendant shall deliver up, etc. (as in Form No. 4).

(2) That if payment of the said sum is not made on or before the day of 19 , the first defendant shall be at liberty to apply that the suit be dismissed or for the sale of the mortgaged property ; and in case he shall apply for a sale the mortgaged property or a sufficient part thereof shall be sold free from the incumbrances of the plaintiff and first defendant and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be paid into Court and applied, first, in payment to the first defendant of the said sum of Rs. *x* and such subsequent interest and costs as may be allowed by the Court : secondly, in payment to the plaintiff of the said sum of Rs. *y* and such subsequent interest and costs as aforesaid : and that the balance, if any, be paid to the second defendant.

(3) That if the plaintiff shall pay the said sum of Rs. *x* into Court on or before the day of 19 , the second defendant shall be at liberty to pay into Court the said sum and the sum of Rs. *y* on or before the day of 19 , and thereupon the plaintiff shall deliver up, etc. (as in Form No. 4).

(4) That if the plaintiff shall pay the said sum as aforesaid but the second defendant shall fail to pay the said sums as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be applied in payment to the plaintiff of the said sums of Rs. *x* and Rs. *y* and such subsequent interest and costs as may be allowed by the Court, and that the balance, if any, be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the said sums, interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

No. 9.

DECREE FOR SALE.—SUB-MORTGAGEE *v.* MORTGAGEE AND MORTGAGOR,
THE AMOUNT OF THE ORIGINAL MORTGAGE EXCEEDING THAT
OF THE SUB-MORTGAGE.

• • • (Title.)

[Insert declarations of the amounts due to the plaintiff Rs. *x* and to the first defendant Rs. *y* as in Form No. 7.]

And it is decreed as follows :—

(1) The first defendant and the second defendant shall be at liberty to pay into Court the said sums of Rs. *x* and Rs. *y* respectively on or before the day of 19 , and upon either of the said payments being made the plaintiff shall deliver up, etc. (as in Form No. 4), and thereupon the sum of Rs. *x* shall be paid to the plaintiff.

(2) In the event of payment by the second defendant as aforesaid the first defendant shall also deliver up, etc. (as in Form No. 4), and thereupon the residue (after payment to the plaintiff as aforesaid) shall be paid to the first defendant.

(3) In default of payment by the first and second defendants as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after deducting thereout the expenses of the sale) shall be paid into Court and applied first in payment to the plaintiff of the said sum of Rs. *x* and such subsequent interest and costs as may be allowed by the Court (but so that the aggregate amount of principal and interest shall not exceed the amount of principal and interest due to first defendant); secondly, in payment to the first defendant of the excess of Rs. *y* over Rs. *x* and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid the second defendant.

(4) In the event of payment by the first defendant and in default of payment by the second defendant as aforesaid, the first defendant shall be at liberty to apply for the sale of the mortgaged property, and thereupon the same or a sufficient part thereof shall be sold, and the net sale-proceeds shall be applied in payment to the first defendant of the said sum of Rs. *y* and such further interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the aforesaid sums with further interest and costs the plaintiff or the first defendant, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance.

No. 10.

FINAL DECREE FOR FORECLOSURE. (O. 34, r. 3.)

(Title.) . .

Upon reading the decree passed in the above suit on the
day of 19 , and the application of the plaintiff dated

the day of 19 and after hearing
 pleader for the plaintiff and pleader for the defendant,
 and it appearing that the payment directed by the said decree has
 not been made :

It is hereby decreed as follows :—

That the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property set out and described in the schedule hereunto annexed. [*Where the defendant is in possession add and shall put the plaintiff in possession of the said property.*]

Schedule.

Description of the mortgaged property.

No. 11.

DECREE AGAINST MORTGAGOR PERSONALLY. (O. 34, r. 6.)

(*Title.*)

Whereas the net proceeds of the sale held under the final decree for sale passed in this suit on the day of 19 , and now in Court to the credit of this suit, amount to Rs. *y*, and there is now due to the plaintiff the sum of Rs. *z* mentioned in the said decree together with the further sum of Rs. interest thereon at the rate of 6 per cent. per annum from the day of 19 to this day, and also the sum of Rs. for his cost, of this suit subsequent to the decree, making a balance due to the plaintiff of Rs. *z*. And whereas it appears to this Court that the defendant is personally liable for the said balance ;

It is hereby decreed as follows :—

- (1) That the said sum of Rs. *y* be paid out of Court to the plaintiff.
- (2) That the defendant do pay to the plaintiff the said sum of Rs. *z* with interest thereon at the rate of 6 per cent. per annum from this day to the date of realization of the said sum.

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